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**Navigating the Shoals of the South China Sea
International Law and Geopolitical Issues Surrounding the Passage
of Sovereign Immune Vessels and Aircraft**

A thesis submitted in fulfilment of the requirements
for the award of the degree

Doctor of Philosophy

from

University of Wollongong

by

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University of Wollongong

October 2016

CERTIFICATION

I, Anh Duc Ton declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Australian National Centre for Ocean Resources and Security (ANCORS), Faculty of Law, Humanities and the Arts, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualification at any other academic institution.

Anh Duc Ton

October 2016

ABSTRACT

The South China Sea is a semi-enclosed sea covering an area of approximately 3.5 million square kilometres and bordering China, Taiwan, and a number of other Southeast Asian States. As one of the busiest international sea lanes linking North East Asia with the rest of the world, securing maritime safety and the freedom of navigation in the South China Sea is essential for global trade. The region is also important from a military perspective. Military vessels and aircraft of regional and extra-regional countries transit through this maritime region, from the Pacific Ocean to the Indian Ocean and the Middle East. However, clashes between littoral States over territorial sovereignty and associated maritime claims in the South China Sea have become commonplace. So too have disputes over differing interpretations of international law provisions relating to navigation and maritime safety in various maritime jurisdictional zones. Indeed, these factors mean that the South China Sea “ranks among the most geographically and geopolitically complex ocean spaces in the world.”¹

All States surrounding the South China Sea (except Taiwan) are parties to the United Nations Convention on the Law of the Sea (LOSC). However, despite the LOSC having entered into force in 1994, many regional disputes remain unresolved, making the South China Sea ripe for potential conflicts. Apart from the LOSC, there are a number of international conventions governing the safe passage of vessels and aircraft on and over the sea. These include the International Regulations for Preventing Collisions at Sea, the International Convention for the Safety of Life at Sea, and the Convention on International Civil Aviation. Nevertheless, in an effort to protect their interests and strengthen their maritime claims in the region, littoral and non-littoral

¹ Clive Schofield, 'What's at stake in the South China Sea? Geographical and geopolitical considerations' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) , 11.

States have strengthened the presence of their military and law enforcement vessels and aircraft (sovereign immune vessels and aircraft). In doing so, multiple clashes have occurred over the past 20 years, with such clashes showing no sign of abatement.

Sovereign immune vessels and aircraft operating at sea should act in accordance with the international law of the sea and air. However, inconsistencies and ambiguities exist in the navigational regimes of the LOSC, the practice of States, as well as in the prevailing international law. Due to the geopolitical complexity of the South China Sea, additional naval and law enforcement vessels including surface combatants, submarines, and aircraft are likely to be operating in this region in the near future. With this concentration of military and law enforcement assets, the potential for maritime incidents involving sovereign immune vessels and aircraft in the South China Sea will undoubtedly increase.

To address the problems arising from the passage of these types of vessels and aircraft, a number of solutions have been devised. They include binding and non-binding regional instruments, bilateral agreements, unilateral initiatives, as well as guidelines proposed by regional governments and academic and policy forums. However, these efforts have had very limited success.

This thesis provides an analysis of the international legal regime and geopolitical issues surrounding the passage of sovereign immune vessels and aircraft in the South China Sea. International law principles, regional efforts, and the practice of South China Sea littoral States regarding the passage of such vessels and aircraft in different maritime zones of jurisdiction are critically analysed. Following on from this, ambiguities and gaps in the current international legal framework and regional efforts are identified. The thesis then provides potential options for clearer, more responsible navigational regimes for sovereign immune vessels and aircraft in the South China Sea.

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TABLE OF CONTENTS

CERTIFICATION	iii
ABSTRACT	v
ACKNOWLEDGEMENTS	vii
TABLE OF CONTENTS	ix
TABLES AND FIGURES	xv
LIST OF ACRONYMS	xvii
1 INTRODUCTION	1
1.1 Introduction	1
1.2 International law and regional initiatives to address the passage of sovereign immune vessels and aircraft at sea	3
1.3 Unresolved maritime disputes in the South China Sea	5
1.4 Incidents to date and the potential for future incidents	9
1.5 Scope, objectives and significance of the thesis	12
1.6 Research Questions	14
1.7 Methodology	17
1.8 Thesis structure	18
2 GEOPOLITICAL CONSIDERATIONS OF THE SOUTH CHINA SEA.....	21
2.1 Introduction	21
2.2 Geographical limits and the significance of the South China Sea	22
2.2.1 Geographical limits of the South China Sea	22
2.2.2 The significance of the South China Sea	26
2.3 Maritime disputes in the South China Sea	31
2.3.1 Disputes over offshore territorial claims in the South China Sea	31
2.3.2 Disputes over maritime boundaries.....	41
2.3.3 Disputes over access to resources	46
2.3.4 Foreign military activities in the maritime zones of coastal States.....	50
2.4 The growth of naval powers and maritime law enforcement capabilities	52

2.4.1	Rise of China’s naval and maritime law enforcement capabilities in the South China Sea	52
2.4.2	Responses from other littoral states	57
2.4.3	Potential maritime incidents in the South China Sea	63
2.5	Conclusion	65
3	STRATEGIC CONTEXT OF THE SOUTH CHINA SEA.....	67
3.1	Introduction.....	67
3.2	Interests and strategies of South China Sea littoral States	68
3.2.1	China’s interests and strategies in the South China Sea	68
3.2.2	Interests and strategies of smaller littoral States	77
3.3	Interests and strategies of extra-regional powers	84
3.3.1	The United States	84
3.3.2	Japan.....	94
3.3.3	India	97
3.3.4	Australia	99
3.4	The Arbitral Tribunal’s ruling and strategic implications for the South China Sea	102
3.5	Conclusion	105
4	INTERNATIONAL LAW PRINCIPLES APPLICABLE TO THE PASSAGE OF SOVEREIGN IMMUNE VESSELS AND AIRCRAFT	107
4.1	Introduction.....	107
4.2	The concept of sovereign immune vessels and aircraft under international law	108
4.2.1	Principle of sovereign immunity.....	108
4.2.2	The concept of sovereign immune vessels and aircraft under international law	109
4.3	International law principles applicable to the passage of sovereign immune vessels and aircraft at sea	111
4.3.1	The Law of the Sea Convention.....	111
4.3.2	Other international laws related to the navigation of sovereign immune vessels and aircraft at sea	142
4.4	Conclusion	146

5 COASTAL STATE PRACTICE IN IMPLEMENTING THE INNOCENT PASSAGE REGIME	149
5.1 Introduction	149
5.2 Domestic legislation and the practice of coastal States regarding the innocent passage regime	150
5.2.1 China	150
5.2.2 Taiwan	158
5.2.3 Vietnam	161
5.2.4 Indonesia	165
5.2.5 The Philippines	170
5.2.6 Malaysia	176
5.2.7 Brunei	179
5.3 Political security and strategic factors that have influenced State practice	180
5.4 Conclusion	187
6 COASTAL STATE PRACTICE IN IMPLEMENTING NAVIGATIONAL REGIMES IN THE EXCLUSIVE ECONOMIC ZONE	191
6.1 Introduction	191
6.2 The practice of coastal States	192
6.2.1 China	192
6.2.2 Taiwan	203
6.2.3 Vietnam	206
6.2.4 Indonesia	208
6.2.5 The Philippines	209
6.2.6 Malaysia	211
6.2.7 Brunei	213
6.3 The uncertain EEZ boundary	213
6.4 Future prospects	218
6.5 Conclusion	221
7 INCIDENTS INVOLVING SOUTH CHINA SEA LITTORAL STATES	225
7.1 Introduction	225

7.2 Incidents involving the passage of sovereign immune vessels in the territorial sea	226
7.2.1 The “ANZAC Day incident”	226
7.2.2 The “Han incident” 2004	230
7.3 Incidents involving the passage of sovereign immune vessels and aircraft in the EEZ	236
7.3.1 The EP-3 incident.....	237
7.3.2 The <i>Impeccable</i> incident	246
7.3.3 <i>Haiyang Shiyou-981</i> Oil Rig Crisis 2014	254
7.4 Other incidents in the South China Sea involving sovereign immune vessels and aircraft	262
7.5 Conclusion	272
8 REGIONAL EFFORTS TO ADDRESS THE PASSAGE OF SOVEREIGN IMMUNE VESSELS AND AIRCRAFT	275
8.1 Introduction.....	275
8.2 Regional efforts to develop guidelines for the passage of sovereign immune vessels and aircraft	275
8.2.1 ASEAN and the Declaration on Conduct of Parties in the South China Sea (DOC)	275
8.2.2 Western Pacific Naval Symposium and the Code for Unplanned Encounters at Sea	286
8.2.3 Bilateral agreements for confidence building measures	296
8.2.4 Track II level efforts	303
8.2.5 The U.S. Freedom of Navigation Program	310
8.3 Conclusion	315
9 CHALLENGES AND THE WAY FORWARD	317
9.1 Introduction.....	317
9.2 Uncertain issues in international law	318
9.3 Key drivers behind state practice	323
9.4 Regional initiatives have been ineffective	325
9.5 Maritime disputes are unlikely to be resolved	330
9.6 Existing political and strategic mistrust between States concerned.....	332

9.6.1	Vietnam-China relations	333
9.6.2	Philippines-China relations	335
9.6.3	United States-China relations.....	337
9.6.4	United States relations with The Philippines and Vietnam.....	340
9.7	Implications for the future security, safety and freedom of navigation and overflight	342
9.8	The way forward	345
9.9	Conclusion	354
10	CONCLUSION	357
10.1	Introduction	357
10.2	Key findings and policy recommendations.....	357
10.3	Recommended areas for further research.....	362
	BIBLIOGRAPHY	365

TABLES AND FIGURES

TABLES

Table 2.1 Estimated conventional hydrocarbon production in the South China Sea by littoral States in 2011	28
Table 2.2 Number of Chinese Navy ships from 2005 to 2015.....	55
Table 5.1 Innocent Passage of Foreign Warships: the Practice of South China Sea littoral States	188
Table 6.1 The Practice of South China Sea Littoral States in relation to Foreign Military Activities in the EEZ.....	222
Table 7.1 Maritime incidents involving South China Sea littoral States	271
Table 8.1 Contents of the Guidelines and the Principles	310

Figure 2.1 Limits of the South China Sea	23
Figure 2.2 New Limits of the South China Sea (draft 4 th edition of IHO S23)	24
Figure 2.3 Bathymetric map of the South China Sea.....	24
Figure 2.4 Islands in the South China Sea	32
Figure 2.5 Maritime boundaries in the South China Sea	44
Figure 5.1 Boundary of the Philippine Treaty Limits	174
Figure 6.1 Vietnam-Malaysia Joint Submission on the Limits of the Continental Shelf-2009.....	215

LIST OF ACRONYMS

ADIZ	Air Defence Identification Zone
ADMM	ASEAN Defence Minister Meeting
ARF	Asian Regional Forum
ASEAN	Association of Southeast Asian Nations
CAFTA	China-ASEAN Free Trade Agreement
CLCS	Commission on the Limits of the Continental Shelf
COC	Code of Conduct in the South China Sea
COLREGs	International Regulations for Preventing Collisions at Sea
CSCAP	Council for Security Cooperation in the Asia-Pacific
CUES	Code for Unplanned Encounters at Sea
DOC	Declaration on the Conduct of Parties in the South China Sea
EAS	East Asian Summit
EEZ	Exclusive Economic Zone
FON	Freedom of Navigation
FSF	Fisheries Surveillance Force
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IFC	International Fusion Centre
IHO	International Hydrographic Organization
ILC	International Law Commission of the United Nations
IMO	International Maritime Organization
INCSEA	Incidents at Sea Agreement
ITLOS	International Tribunal on the Law of the Sea
LCS	Littoral Combat Ship

LOSC	Law of the Sea Convention
MALINDO	Incidents at Sea Agreement between Indonesia and Malaysia
MARPOL	International Convention for the Prevention of Pollution from Ships
MMCA	Military Maritime Consultative Agreement
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
NPCF	North Pacific Coast Guard Forum
OPRF	Ocean Policy Research Foundation
SLOC	Sea Lanes of Communication
SOLAS	International Convention for the Safety of Life at Sea
TWG	Technical Working Group
UNCLOS	United Nations Conference on the Law of the Sea
WPNS	Western Pacific Naval Symposium

1 INTRODUCTION

1.1 Introduction

Security tensions in the South China Sea caused by maritime disputes and complex strategic relations have increased. One important aspect of maritime security in the South China Sea is tensions generated by differences over the operation of vessels and aircraft from navies and law enforcement services in waters under the jurisdiction, or claimed jurisdiction, of littoral States. There have thus been numerous incidents in the South China Sea involving these types of vessels and aircraft, and with rising tensions and the proliferation of forces operating in the area, the potential for further incidents is likely to grow. The risk of a major war in the South China Sea is low; however, rising political temperatures mean that maritime conflicts might still occur.

The South China Sea is a semi-enclosed sea surrounded by seven littoral States and territories, Vietnam, China, Taiwan, the Philippines, Malaysia, Brunei, and Indonesia.¹ This region is not only a fertile fishing ground,² but also rich in hydrocarbon deposits.³ Apart from natural resources, the South China Sea is the world's second busiest international sea lane, linking the Pacific Ocean to the Indian Ocean. However, maritime disputes in the South China Sea are very complex and difficult to resolve. These disputes concern territorial sovereignty and maritime boundary claims, and can be bilateral, trilateral or multilateral in nature. In addition, disputes exist between littoral

¹ Thailand and Cambodia are not considered South China Sea littoral States as the Gulf of Thailand does not form part of the South China Sea. Singapore is not considered a State bordering the South China Sea, as for the purpose of this thesis, the limits of the South China Sea are based on the 4th draft of the International Hydrographic Organization Publication S-23 (see Chapter two for more details).

² UNEP, 'Procedure for Establishing a Regional System of Fisheries Refugia in the South China Sea and Gulf of Thailand in the context of the UNEP/GEF project titled "Reserving Environmental Degradation Trends in the South China Sea and Gulf of Thailand" in *South China Sea Knowledge Document* (UNEP, 2007) , 1. It is also worth noting that the South China Sea's fisheries have been severely over-exploited and the depletion of fish stocks in this area due to overfishing and pollution is a really big concern, see Sumaila, Rashid and William Cheung, 'Boom or Bust: the Future of Fish in the South China Sea' (2015) <http://www.admcf.org/wordpress/wp-content/uploads/2015/11/FishSCSea03_11-FINAL-FINAL.pdf>.

³ U.S. Energy Information Administration, 'South China Sea' (7 February 2013).

States and extra-regional powers over the freedom of navigation and overflight in various maritime zones.

In order to strengthen their territorial sovereignty and maritime claims, the States concerned have employed different approaches. These approaches include the construction of artificial islands- on disputed offshore features, deploying naval and maritime law enforcement personnel to assert their claims, applying restrictive views on the freedoms of navigation and overflight in various maritime jurisdiction zones, as well as using coercive power to further advance their claims.

The international law of the sea has played a vital role in promoting global peace and preventing air and sea incidents. However, the law of the sea cannot help to solve sovereignty disputes over land features. Moreover, as international treaties are invariably the product of compromise, there are always gaps and ambiguities in their provisions. As a result, States have adopted conflicting interpretations of international law provisions – interpretations which suit their own vested interests. Due to existing gaps and ambiguities in the international legal regime, and the geopolitical complexity of the South China Sea, there have been many incidents involving the passage of naval and law enforcement vessels and aircraft in this region.

Apart from international law, there have been a number of regional initiatives to address safe navigation and overflight at sea, including bilateral and multilateral agreements advocated by regional institutions, as well as guidelines and principles proposed by regional academic and policy forums. However, these initiatives have had limited success.

As territorial and maritime disputes in the South China Sea are unlikely to be resolved in the near future, concerned States have responded by modernising their maritime forces, including naval, coastguard and other types of civilian law

enforcement assets. The increasing presence of naval and maritime law enforcement vessels and aircraft (sovereign immune vessels and aircraft) from littoral states, and the presence of vessels and aircraft of extra-regional powers in this confined and congested region, will continue to create high tensions and the potential for maritime incidents in the South China Sea.

This thesis uses the term “sovereign immune vessels and aircraft” to refer to all vessels and aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.⁴ These types of vessels and aircraft include, but are not limited to, vessels and aircraft of navies, coast guards, fisheries agencies and border protection agencies. This thesis aims to analyse this problem and identify ways to reduce the likelihood of future potential incidents by providing a number of recommendations based on the existing international law and the geopolitical contexts of the South China Sea.

1.2 International law and regional initiatives to address the passage of sovereign immune vessels and aircraft at sea

There are a number of international conventions addressing the passage of sovereign immune vessels and aircraft at sea. These include the United Nations Convention on the Law of the Sea (LOSC);⁵ the International Regulations for Preventing Collisions at Sea (COLREGs);⁶ the International Convention for the Safety of Life at Sea (SOLAS);⁷ and the Convention on International Civil Aviation (Chicago

⁴ See Chapter Four for a detailed definition of “sovereign immune vessels and aircraft.”

⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982 (entered into force 16 November 1994), [hereafter LOSC].

⁶ *International Regulations for Preventing Collisions at Sea*, adopted 20 October 1972 (entered into force 15 July 1977) [hereafter COLREGs], rule 1.

⁷ *International Convention for the Safety of Life at Sea*, adopted 1 November 1974 (entered into force 25 May 1980) [hereafter SOLAS].

Convention).⁸ However, due to existing gaps and ambiguities in these conventions, the passage of these types of vessels and aircraft is not clearly addressed. In the South China Sea, state practice regarding the passage of sovereign immune vessels and aircraft is also divergent. As a result, there have been frequent incidents in the region involving sovereign immune vessels and aircraft of littoral States and extra-regional players.

In an effort to fill the gaps and ambiguities in the existing international law, a number of regional initiatives addressing the passage of sovereign immune vessels and aircraft in the South China Sea have been devised. These include: (i) the Declaration on Conduct of Parties in the South China Sea signed by ASEAN member states and China in 2002; (ii) the Code for Unplanned Encounters at Sea adopted by the Western Pacific Naval Symposium in 2014; (iii) the Guidelines for Navigation and Overflight in the Exclusive Economic Zone, as well as its revision initiated by a group of academic and policy experts and titled Principles for Building Confidence and Security in the Exclusive Economic Zone of the Asia-Pacific; (iv) policy recommendations proposed by the South China Sea Workshop Process initiated by Indonesia in 1989 and the Council for Security Cooperation in the Asia Pacific (CSCAP) established in 1993; and (v) other maritime cooperative and confidence building measures between littoral States of the South China Sea.⁹ There have been a number of bilateral agreements for managing incidents at sea in other contexts which could also be applied to the South China Sea region. The Incidents at Sea Agreement signed by the United States and the former Soviet Union in 1972 (INCSEA 1972),¹⁰ and the Incidents at Sea Agreement

⁸ *Convention on International Civil Aviation*, signed 7 December 1944 (entered into force 4 April 1947), art 3.

⁹ See Chapter 7 of the thesis for a detailed discussion.

¹⁰ *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972).

between Indonesia and Malaysia (MALINDO) signed in 2001, are examples of bilateral agreements for managing incidents at sea.¹¹ In 1979 the United States launched the U.S. Freedom of Navigation (FON) Program to oppose excessive maritime claims through “a peaceful exercise of the rights and freedoms of navigation and overflight recognized under international law.”¹² Indeed, a number of operational assertions have been conducted under the FON Program to challenge the excessive maritime claims of South China Sea littoral States.¹³ However, these efforts have had little success in preventing contentious incidents involving the passage of sovereign immune vessels and aircraft in the region.

1.3 Unresolved maritime disputes in the South China Sea

Maritime disputes in the South China Sea have resisted easy resolution. These disputes concern territorial sovereignty and associated maritime claims, access to resources, the legal status of islands under the LOSC, as well as navigational regimes in the LOSC, particularly the innocent passage of foreign warships and the freedoms of navigation and overflight in the exclusive economic zone (EEZ) of coastal States.

There are more than 250 small offshore features located in the middle of the South China Sea, including islands, rocks, reefs, shoals, and atolls.¹⁴ The exact number of these features is not available as most of them are submerged at high tide, and only

¹¹ MALINDO Prevention of Sea Incident Cooperative Guidelines (Jakarta 18 January 2001).

¹² Department of State, *Limits of the Seas: United States Responses to Excessive Maritime Claims* (United States Department of State, 1992), 6.

¹³ *DoD Annual Freedom of Navigation (FON) Reports* (15 February 2016) U.S. Department of Defense <<http://policy.defense.gov/OSDP-Offices/FON>>; see also Marcus Weisgerber, *Annual DoD Report Claims Steady Chinese Military Expansion* (6 May 2013) Defense News <<http://www.defensenews.com/article/20130506/DEFREG02/305060008/>>.

¹⁴ Sonika Gupta, 'Emerging Security Architecture in Southeast & East Asia: Growing Tensions in the South China Sea' (2013) 213 *ISPS Issue Brief* 1, 2.

some of them may be classified as islands under the LOSC.¹⁵ Sovereignty claims over these offshore features by States surrounding the South China Sea are overlapping and difficult to resolve. Indeed, there are five offshore groups of features in the South China Sea which are claimed by more than one State. These include the Pratas Islands, the Paracel Islands, Scarborough Shoal, Macclesfield Bank, and the Spratly Islands. The Pratas Islands are located in the north-eastern part of the South China Sea and cover an ocean space of approximately 45 square kilometres. Although currently occupied by Taiwan, the Pratas Islands have also been claimed by China.¹⁶ The Paracel Islands are located in the north-western part of the South China Sea and cover an ocean surface area of more than 16,000 square kilometres. These islands are subject to overlapping territorial claims by China, Taiwan and Vietnam, but are currently under Chinese control.¹⁷ Scarborough Shoal is located approximately 124 nautical miles from Zambales Province in the Philippines and within the Philippines' claimed EEZ.¹⁸ This feature is claimed by China, Taiwan and the Philippines, but since the maritime standoff between the two States in 2012, China appears to have taken effective control of the Shoal.¹⁹ Macclesfield Bank consists of a group of entirely submerged shoals and reefs located in the centre of the South China Sea, between the Paracel Islands and Scarborough Shoal.²⁰ This Bank is claimed by China and Taiwan; however, as this

¹⁵ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994), Art 121. Article 121 of the LOSC defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide".

¹⁶ National Geospatial Intelligence Agency, 'South China Sea and the Gulf of Thailand' in *Sailing Direction* (National Geospatial Intelligence Agency, 13th ed, 2011) , 4.

¹⁷ Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claims' (2012) 1 *Journal of East Asia and International Law* 165, 167.

¹⁸ Robert Beckman, 'Scarborough Shoal: Flashpoint for Confrontation or Opportunity for Cooperation?' (2012) (7/2012) *RSIS Commentaries* 1, 2.

¹⁹ M. Taylor Fravel, *China's Island Strategy: "Redefine the Status Quo."* (1 November 2012) *The Diplomat* <<http://thediplomat.com/2012/11/chinas-island-strategy-redefine-the-status-quo/>>.

²⁰ Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress' (Congressional Research Service, 5 August 2014), 3.

feature is totally submerged, no State can effectively occupy it. The Spratly Islands are located in the south-eastern part of the South China Sea and cover an ocean surface area of approximately 240,000 square kilometres.²¹ China, Taiwan and Vietnam claim the whole archipelago, while Malaysia, the Philippines and Brunei claim certain parts of it. All claimants, with the exception of Brunei, have military or maritime forces present in the archipelago. Over the past few years, China has conducted an extensive artificial island-building program on a number of its occupied features in the Spratlys, ignoring protests from other claimant States and concerned countries.²²

Under the LOSC, an island may have its own territorial sea, contiguous zone, exclusive economic zone and continental shelf. However, “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”²³ To date, only China has claimed that the Spratly Islands are entitled to a territorial sea, an EEZ and a continental shelf.²⁴ Other claimants have not officially stated whether they share China’s view with regard to the Spratly Islands, or whether these islands should all be regarded as “rocks” under Article 121 of the LOSC. On 12 July 2016, an arbitral tribunal established as a result of a case brought by the Philippines under Annex VII of the LOSC issued an award in the South China Sea dispute between China and the Philippines. The arbitral tribunal ruled that none of the

²¹ Clive H Schofield, 'Island disputes and the "oil factor" in the South China Sea disputes' (2012) 4 *Current Intelligence* 3, 3.

²² See Greg Torode, *China to project power from artificial islands in South China Sea* (19 February 2015) Reuters <<http://www.reuters.com/article/2015/02/19/us-southchinasea-reefs-china-idUSKBN0LN0J820150219>>; see also *Senators McCain, Reed, Corker, and Menendez Send Letter on Chinese Maritime Strategy* (19 March 2015) United States Senate Committee on Armed Services <<http://www.armed-services.senate.gov/press-releases/senators-mccain-reed-corker-and-menendez-send-letter-on-chinese-maritime-strategy>>.

²³ LOSC, art 121.

²⁴ See Communication dated 14 April 2011 on the CLCS <https://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.

features in the Spratly Islands are capable of generating an EEZ or a continental shelf.²⁵ Although the arbitral tribunal's award is legally binding on all the parties to the arbitration, it is unenforceable. In fact, China has rejected the arbitral tribunal's ruling outright.

In addition to territorial sovereignty disputes and associated maritime claims over offshore features in the South China Sea, China and Taiwan's ambiguous nine-dash line claim which covers almost the whole South China Sea area has created confusion and tension among littoral States and extra-regional players.²⁶ Vietnam, Indonesia and the United States have rejected China's nine-dash line claim as having no international legal basis, while the Philippines took the step of referring the matter to arbitration, requesting an award to the effect that China's claim is contrary to the LOSC.²⁷ Many commentators have disputed the legal and technical basis for the nine-dash line, and it continues to prove a major obstacle to dispute resolution in the South China Sea.²⁸ In its final award, the arbitral tribunal ruled that the nine-dash line claimed by China has no legal basis. This is indeed a landmark ruling, but enforcing the decision and establishing its validity under customary international law will be challenging, not the least because China has rejected the ruling and will thus continue to assert the claim.

²⁵ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [646].

²⁶ China introduced the so-called nine dash-line in 2009 in response to joint submissions by Vietnam and Malaysia on their extended continental shelves to the CLCS. See Notes Verbal CML/18/2009 (7 May 2009) < http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf>.

²⁷ See United States Department of State *Limits in the Seas: China's Maritime Claims in the South China Sea* (5 December 2014); Department of Foreign Affairs, Republic of the Philippines, *Notification and Statement of Claim*, Manila 22 January 2013; See Vietnam Notes < http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vnm_e.pdf>; Indonesia Notes < http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf>.

²⁸ Melek has commented that the nine dash-line map "has little or no legal value for China to establish its sovereignty or historic right claim." See Melda Malek, 'A Legal Assessment of China's historic claims in the South China Sea' (2013) 5(1) *Australian Journal of Maritime and Oceans Affairs* 28, 34; Florian Dupuy and Pierre Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 131-36; see also Francois Xavier Bonnet, 'Geopolitics of Scarborough Shoal' 2012 14 *Irasec's Discussion Papers* 1, 23.

1.4 Incidents to date and the potential for future incidents

There have been two prominent incidents between sovereign immune vessels and aircraft in the South China Sea in recent times. The first took place in 2001 and involved a collision between a Chinese F-8II fighter and a U.S. EP-3 maritime reconnaissance aircraft. The second incident occurred in 2009 and involved a U.S. ocean surveillance ship, the USNS *Impeccable*, and a group of five Chinese law enforcement and fishing vessels.²⁹ In both cases, the United States argued that military surveying, hydrographic surveying and intelligence collection by military vessels and aircraft in a foreign State's EEZ are part of the normal high seas freedoms of navigation and overflight granted under the LOSC. Meanwhile, China argued that unauthorised military data collection in its EEZ violates the principle of the peaceful use of the sea set out in the LOSC.³⁰ In June 2009, a Chinese navy submarine hit the sonar array towed by the destroyer USS *John McCain* near Subic Bay, approximately 144 miles off the coast of the Philippines.³¹ On 5 December 2013, a Chinese amphibious ship encountered the USS *Cowpens* in the South China Sea at a distance of less than 500 yards, forcing the *Cowpens* to take evasive action to avoid a collision.³² On 19 August 2014, a Chinese *Shenyang* J-11B fighter intercepted a U.S. Navy P-8 marine patrol and surveillance aircraft in international airspace over the South China Sea. The incident occurred approximately 135 miles east of China's Hainan Island and within China's claimed

²⁹ See Chapter seven of this thesis for details.

³⁰ Shirley A Kan, 'China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications' (Congressional Research Service, October 2001), 20.

³¹ David Carter and Erik Slavin, *USS McCain arrives at Sasebo after suffering damage to sonar array* (17 June 2009) Stars and Stripes <<http://www.stripes.com/news/uss-mccain-arrives-at-sasebo-after-suffering-damage-to-sonar-array-1.92521>>.

³² See Chapter seven of the thesis for further details.

EEZ.³³ According to Pentagon spokesman Rear Admiral John Kirby, the interception was “very close, very dangerous... pretty aggressive and very unprofessional.”³⁴ As China and the United States have conflicting views over what types of military activities can be conducted in the EEZ of coastal States, further incidents involving the navigation of sovereign immune vessels and aircraft in the South China Sea are likely to occur in the future.

Incidents involving law enforcement vessels of South China Sea littoral States have also increased in recent years. In June 2010, a standoff occurred when the Indonesian navy seized a Chinese fishing vessel operating in the waters north of Natuna Island in Indonesia’s claimed EEZ. A Chinese maritime surveillance vessel arrived on the scene and pointed its large-calibre machine gun at the Indonesian naval vessel and threatened to fire if the Indonesian vessel did not release the Chinese fishing boat.³⁵ On 2 March 2011, two Chinese patrol boats manoeuvred close to and threatened to ram the MV *Veritas Voyager*, a Philippine survey vessel operating in the Reed Bank area off Palawan Island in the Philippines. The actions of the Chinese patrol boats ultimately forced the MV *Veritas Voyager* to leave the area.³⁶ On 26 May 2011, a Chinese maritime surveillance vessel intentionally cut the cable towed by the *Binh Minh 02*, a vessel operated by PetroVietnam well within Vietnam’s claimed EEZ.³⁷ In 2012, China and the Philippines were involved in a two month standoff at Scarborough Shoal – a feature over which both countries claim sovereignty. The standoff was sparked by two

³³ Christopher P. Cavas, *Chinese Fighter Buzzes US Patrol Aircraft* (22 August 2014) Defense News <<http://archive.defensenews.com/article/20140822/DEFREG02/308220025/Chinese-Fighter-Buzzes-US-Patrol-Aircraft>>.

³⁴ Quoted in *ibid*.

³⁵ Kelly Currie, *Why is China Picking Fights with Indonesia?* (6 August 2010) Weekly Standard <<http://www.weeklystandard.com/blogs/why-china-picking-fights-indonesia>>.

³⁶ *Philippines halts tests after China patrol challenge* (8 March 2011) British Broadcasting Corporation (BBC) <<http://www.bbc.co.uk/news/world-asia-pacific-12672889>>.

³⁷ James Kraska and Raul Pedrozo, *International Maritime Security Law* (Koninklijke Brill NV, 2013), 323.

Chinese marine surveillance vessels preventing a Philippine warship, the BRP *Gregorio del Pilar*, from arresting eight Chinese fishing vessels engaged in alleged illegal fishing in the Shoal.³⁸ On 9 May 2013, a Taiwanese fisherman was shot dead by a Philippine patrol craft in an area where the EEZs claimed by Taiwan and the Philippines overlap.³⁹ In 2014, tensions escalated in the South China Sea when China placed the *Haiyang Shiyou 981* (HYSY 981) oil rig in Vietnam's claimed EEZ and deployed approximately 80 escort vessels, including seven military ships and a number of military aircraft, to protect the oil rig.⁴⁰ In response, Vietnam dispatched a number of law enforcement vessels to the area in order to issue warnings to the Chinese vessels and demand that the rig be removed from Vietnam's EEZ and continental shelf.⁴¹ During this maritime standoff, Vietnam accused Chinese Coast Guard ships of aggressively firing high-powered water cannons at, and intentionally ramming, Vietnam's maritime law enforcement ships while Chinese aircraft circled above them.⁴² It is important to note that Chinese Coast Guard ships deliberately used the high-powered water cannons not

³⁸ Renato Cruz De Castro, 'China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff' (Paper presented at the Conference for the Managing Tensions in the South China Sea, CSIS 5-6 June 2013), 5.

³⁹ Shih Hsiu-chuan and Jake Chung, *Fisherman killed in disputed waters* (10 May 2013) Taipei Times <<http://www.taipetimes.com/News/front/archives/2013/05/10/2003561896>>.

⁴⁰ Ernest Z Bower and Gregory B Poling, *China-Vietnam Tensions High over Drilling Rig in Disputed Waters* (7 May 2014) Center for Strategic & International Studies <<http://csis.org/publication/critical-questions-china-vietnam-tensions-high-over-drilling-rig-disputed-waters>>; see also *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyou 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam*, *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyou 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam* (7 July 2014) Consulate of the Socialist Republic of Vietnam in New York, The United States of America <<http://vietnamconsulate-ny.org/news/2014/07/position-paper-viet-nam-chinas-illegal-placement-haiyang-shiyou-981-oil-rig-exclusive>>.

⁴¹ See Bower and Poling, above n 147; see also Tomotaka Shoji, *Vietnam and China over the South China Sea: The confrontation proceeds towards a new phase* (2 July 2014) World Affairs <<http://www.worldaffairsjournal.org/content/vietnam-and-china-over-south-china-sea-confrontation-proceeds-towards-new-phase>>.

⁴² *Chinese aircraft intimidate Vietnam's law enforcement vessels* (21 June 2014) Vietnamnet <<http://english.vietnamnet.vn/fms/government/105605/chinese-aircraft-intimidate-vietnam-s-law-enforcement-vessels.html>>; see also *Chinese ships ram Vietnamese vessels in latest oil rig row: officials* (7 May 2014) Thanhnien News <<http://www.thanhniennews.com/politics/chinese-ships-ram-vietnamese-vessels-in-latest-oil-rig-row-officials-26069.html>>.

only to damage communication systems of Vietnamese vessels but also cause injuries to the crew on board these vessels.⁴³

The Chinese navy's South Sea Fleet and the fleets of other navies operating in the South China Sea currently comprise approximately 40 submarines, 85 principal surface combatants and 390 patrol and coastal combatants, while the vessels belonging to the law enforcement agencies of these States comprise roughly 1150 patrol vessels.⁴⁴ Moreover, these numbers are expected to increase in the coming years. Due to the overlapping maritime claims, and the increasing presence of naval and law enforcement vessels and aircraft, incidents involving sovereign immune vessels and aircraft in the region are unlikely to reduce in frequency.

1.5 Scope, objectives and significance of the thesis

This thesis focuses on the passage of sovereign immune vessels and aircraft in the South China Sea. The geographic scope of the South China Sea which this thesis will use is the area designated in the draft 4th edition of the International Hydrographic Organization (IHO) Publication S-23, which was submitted to the IHO in 2002⁴⁵. The reason for selecting this particular geographic scope for the South China Sea is explained in Chapter two of the thesis.

The research seeks to analyse international law, regional efforts and political issues surrounding the passage of sovereign immune vessels and aircraft in the South China Sea. Based on these analyses, the existing gaps and ambiguities in the

⁴³ *Chinese vessels keep firing water at Vietnamese ships in Vietnam's seas* (13 March 2014) Tuoitrenews <<http://tuoitrenews.vn/society/19615/chinese-vessels-continue-to-fire-water-at-vietnamese-ships-in-its-waters>>.

⁴⁴ 'Chapter Six: Asia' (2013) 113(1) *Military Balance* 245, 245-352; 'Chapter Six: Asia' (2016) 116 (1) *Military Balance* 211, 211-306. The number of vessels stated above has been adapted by the author from data provided in this document.

⁴⁵ The draft 4th edition of S-23 has not yet been approved. However, as the limits of the South China Sea defined in the 1953 special publication 'Limits of Ocean and Seas' (also known as IHO S-23) include the Strait of Taiwan, the Gulf of Tonkin and the Natuna Sea, the author does not consider these limits to be appropriate. See Chapter Two of this thesis for additional details.

international legal regime and regional efforts will be identified and critically evaluated. Moreover, by examining the geopolitical and geostrategic importance of the South China Sea, the thesis will identify key challenges in addressing these gaps and ambiguities with the objective of preventing maritime incidents in the South China Sea involving sovereign immune vessels and aircraft. Finally, the thesis highlights implications for the future security, safety and freedom of navigation and overflight in the South China Sea, and provides a number of legal and policy recommendations for addressing these challenges.

There have been a number of legal studies focusing on South China Sea issues. However, most of this research has concentrated on areas such as territorial sovereignty claims and associated maritime disputes;⁴⁶ conflict management;⁴⁷ maritime confidence building measures;⁴⁸ joint development;⁴⁹ and foreign military activities in the exclusive

⁴⁶ Leszek Buszynski and Christopher B Robert (eds), *The South China Sea Maritime Disputes: Political, Legal and Regional Perspectives* (Routledge, 2015); Dong Manh Nguyen, 'Settlement of Disputes under the 1982 United Nations Convention on the Law of the Sea: The Case of the South China Sea Disputes' (2006) 25(1) *University of Queensland Law Journal* 145; Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 *American Journal of International Law* 142; Robert Beckman, 'The South China Sea: the evolving dispute between China and her maritime neighbours' (2013) 21(3) *Geomatics World* 17; Nick A Owen and Clive H Schofield, 'Disputed South China Sea hydrocarbons in perspective' (2012) 36(3) *Maritime Policy* 809; Gregory B Poling, 'The South China Sea in Focus: Clarifying the Limits of Maritime Dispute' (CSIS Report, July 2013); Robert C. Beckman and Clive H. Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) *The International Journal of Marine and Coastal Law* 193.

⁴⁷ Munmun Majumdar, 'The ASEAN Way of Conflict Management in the South China Sea' (2015) 39(1) *Strategic Analysis* 73; Hasjim Djalal, 'Conflict Management Experiences in Southeast Asia: Lessons and Implications for the South China Sea Disputes' (2011) 3(4) *Asian Politics and Policy* 627; Sheldon W Simon, 'Conflict and Diplomacy in the South China Sea: The View from Washington' (2012) 52(2) *Asian Survey* 995; Gupta, above n 14.

⁴⁸ Sam Bateman, 'Confidence-Building Measures for the South China Sea' in Euan Graham and Henrick Z. Tseng (eds), *Navigating the Indo-Pacific Arc* (Nanyang Technological University, 2014) ; Christopher C Joyner, 'The Spratly Islands Disputes: Legal Issues and Prospect for Diplomatic Accommodation' in Baker John C and Wiencek David G (eds), *Cooperative Monitoring in the South China Sea: Satellite Imagery, Confidence Building Measures, and the Spratly Islands Disputes* (Greenwood Press, 2002) ; Justin Jones, 'Background paper: A naval perspective of maritime confidence building measures' (ASPI Special Report, September 2013); Sam Bateman, 'Background paper: Existing and previous maritime cooperative arrangements in the South China Sea' (Australian Strategic Policy Institute, 11-13 August 2013 2013);

⁴⁹ Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea : Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013); Leszek Buszynski, 'The South China Sea: Avenues Towards a Resolution of the Issue' in Tran Thuy Truong (ed), *The South*

economic zone.⁵⁰ There have been multiple incidents in the South China Sea involving vessels and aircraft of navies, coast guards and civilian law enforcement agencies of littoral States and extra-regional players. However, to date, there have been no comprehensive studies focusing on the international legal regime governing the passage of sovereign immune vessels and aircraft. Nor have there been any regional studies evaluating the relevant international law or grass-roots initiatives regulating the passage of sovereign immune vessels and aircraft in the South China Sea. This thesis provides a comprehensive study on the international legal regime and geopolitical issues surrounding the passage of sovereign immune vessels and aircraft in the South China Sea. Accordingly, it seeks to contribute an understanding of the range of measures aimed at minimising maritime incidents in the South China Sea while strengthening the peace, security and freedom of navigation and overflight in the maritime region.

1.6 Research Questions

The research focuses on the following key questions:

First, *what are the current geopolitical considerations in the South China Sea?*

Understanding the geographical and geopolitical situation in the South China Sea is an essential preliminary step. Key factors to be addressed include territorial sovereignty disputes and associated maritime claims between littoral States; disputes over access to resources; differing interpretations of navigational regimes under the LOSC by littoral

China Sea: Cooperation for Regional Security and Development (Diplomatic Academy of Vietnam, 2010) .

⁵⁰ Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 9; Yu Zhirong, 'Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) vol 7, ; Andrew S Williams, 'Aerial Reconnaissance by Military Aircraft in the Exclusive Economic Zone' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) ; Jon M. Van Dyke, 'Military ships and planes operating in the exclusive economic zone of another country' (2004) 28 *Marine Policy* 29.

States (and between littoral States and external players); the strategic and economic significance of the South China Sea region; and the burgeoning growth of naval powers and maritime law enforcement capabilities, as well as the increased potential for maritime incidents in the region.

Second, *what is the strategic context of the South China Sea?* To address this question, the interests and strategies of littoral States and external players in the South China Sea will be explored. In addition, the strategic implications of the recent arbitral award in the Philippines-China case will be critically analysed.

Third, *what are the relevant international legal principles applicable to the passage of sovereign immune vessels and aircraft in different maritime zones of jurisdiction?* The LOSC is popularly considered the “Constitution for the Oceans”, and its success lies in the fact that it “establishes a legal framework to govern all uses of the oceans.”⁵¹ Apart from the regime of deep seabed mining and the protection and preservation of the marine environment and marine scientific research, most of the provisions of the LOSC directly or indirectly address the issue of freedom of navigation and other internationally lawful uses of the sea related to navigation.⁵² Apart from the LOSC, there are other international treaties containing provisions related to the navigation of sovereign immune vessels and aircraft at sea. These include COLREGs, the SOLAS Convention and the Chicago Convention. However, as international treaties are the product of compromise, there are bound to be gaps and ambiguities in their provisions. These gaps and ambiguities can be intentional or unintentional, and arise

⁵¹ Beckman, above n 49, 142.

⁵² Thomas A Mensah, 'Foreward' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) , Viii.

due to a lack of agreement between State parties.⁵³ It is therefore necessary to analyse the international legal regimes governing navigation and overflight at sea.

Fourth, *what do the national legislation and practices of littoral States of the South China Sea indicate about the passage of sovereign immune vessels and aircraft in different maritime zones of jurisdiction?* As international law is not free from ambiguities, States have interpreted and implemented the provisions of the LOSC and other relevant instruments differently to suit their own national and strategic interests. All South China Sea littoral States are parties to the above-mentioned international treaties; however, they have interpreted the provisions of these conventions in different ways. For this reason, it is necessary to examine their domestic legislation and practices to gain a better understanding of how the relevant international legal provisions have been implemented with regard to the passage of sovereign immune vessels and aircraft.

Fifth, *what role are regional efforts playing in promoting the safety of navigation and overflight of sovereign immune vessels and aircraft in the South China Sea?* A number of regional initiatives have been devised to address the passage of sovereign immune vessel and aircraft in the South China Sea. These include binding and non-binding regional instruments, bilateral agreements, unilateral initiatives, as well as guidelines proposed by academic and policy forums. It is critically important to examine current regional initiatives to determine their effectiveness in promoting the safety of navigation and overflight of sovereign immune vessels and aircraft in the region.

Sixth, *what are the remaining challenges in addressing the passage of sovereign immune vessels and aircraft in the South China Sea?* To answer this question, the

⁵³ See Dennis Mandsager, 'The U.S. Freedom of Navigation Program: Policy, Procedure, and Future' in Michael N. Schmitt (ed), *The Law of Military Operations* (Naval War College Press, 1998) , 124.

remaining uncertainties in the international legal regime will be explored. The shortfalls that exist in relation to regional efforts will also be evaluated, as will the unresolved maritime disputes and the political and strategic mistrust that exists between States.

Seventh, *what are the possible options for implementing more responsible navigation behaviours for sovereign immune vessels and aircraft in the South China Sea?* Based on the critical analyses conducted in the previous chapters of the thesis, a number of legal and policy recommendations will be made with the objective of minimising maritime incidents involving sovereign immune vessels and aircraft in the South China Sea. Provided these recommendations are adopted by a majority of States, the result should be the promotion of peace, security, and the freedom of navigation and overflight in the region.

1.7 Methodology

The methodology used in this thesis is a combination of systematic identification, collection and analysis of related documents, as well as the personal experience of the author. The documents used in the preparation of this thesis include primary and secondary sources. The primary sources include international legal materials such as binding and non-binding regional agreements and related instruments, the national legislation and subordinate legislation of States, as well as the practice of individual States (as evidenced by governmental policy documents). The secondary sources include books, journal articles, academic presentations, conference papers, informal interviews conducted by the author, relevant textbooks, and other online data. With reference to the above sources, the gaps and ambiguities which exist in international law, and the adequacy of regional efforts in addressing the passage of sovereign immune vessels and aircraft in the South China Sea (as well as political issues

surrounding the passage of vessels and aircraft of this type) will be critically evaluated. Incidents involving the passage of sovereign immune vessels and aircraft of South China Sea littoral States will also be examined. The remaining challenges will then be identified and recommendations made.

The author has been a member of the Vietnamese navy since 1992. As a navigation officer, the author has spent several years on board Vietnamese naval vessels and has been actively involved in various types of training and practical activities at sea, including combined maritime patrols, hydrographic surveying, as well as maritime search and rescue activities.⁵⁴ The author's professional experiences and academic knowledge are reflected in this thesis.

1.8 Thesis structure

The thesis is structured in ten chapters, as follows:

Chapter One is the introductory chapter.

Chapter Two discusses geopolitical considerations related to the South China Sea. It examines unresolved disputes over territorial sovereignty and associated maritime claims, evaluates the strategic and economic significance of the South China Sea, as well as the potential for maritime incidents and accidents involving the passage of sovereign immune vessels and aircraft.

Chapter Three considers the strategic context of the South China Sea. This chapter critically analyses the interests and strategies of littoral States and extra-regional players in the South China Sea. Moreover, with the arbitral tribunal recently issuing its

⁵⁴ The author joined the Vietnamese Navy in 1992, obtained a Master's Degree in Maritime Policy from the University of Wollongong in 2003, completed a hydrographic survey course at the RAN Hydrographic School in 2006, graduated from the Australian Command and Staff College in 2010 and completed a Maritime Search and Rescue course in the United States in 2012. Currently, the author is a lecturer in the Faculty of Navigation at the Vietnamese Naval Academy.

landmark award in the Philippines-China arbitration, this chapter highlights the strategic implications of this award for the South China Sea area.

Chapter Four discusses relevant international legal principles applicable to the passage of sovereign immune vessels and aircraft in various maritime zones of jurisdiction. It examines the navigational regimes of the LOSC, with a particular focus on innocent passage in the territorial sea and the freedom of navigation and overflight in the EEZ. In addition, supplementary international treaties governing the safety of air and maritime encounters are critically analysed.

Chapter Five examines the current domestic legislation and practices of South China Sea littoral States in implementing the LOSC innocent passage regime. It also highlights political, security and strategic factors that have influenced trends in State practice.

Chapter Six examines the current national legislation and practices of South China Sea littoral States in implementing the LOSC EEZ regime. This chapter focuses on controversial issues arising from foreign military activities in the EEZs of coastal States, particularly hydrographic surveying, military surveying, as well as maritime surveillance conducted by military vessels and aircraft. In addition, the chapter highlights uncertain EEZ boundaries in the South China Sea that impact the implementation of the EEZ regime in the region.

Chapter Seven examines specific incidents involving the passage of sovereign immune vessels and aircraft in various maritime jurisdictional zones in the South China Sea. The incidents under investigation fall into broad main categories: (i) incidents which have occurred due to differing interpretations by States of the innocent passage and EEZ regimes under the LOSC; (ii) disputes over access to resources; and (iii)

incidents arising from the unsafe or unprofessional conduct of vessels and aircraft of States.

Chapter Eight evaluates regional efforts aimed at addressing the passage of sovereign immune vessels and aircraft in the South China Sea. Efforts initiated by regional institutions, academic and policy forums, as well as bilateral agreements and unilateral initiatives are critically examined and evaluated.

Chapter Nine identifies the remaining challenges and key drivers behind the State practices. It highlights implications for the future security, safety and freedom of navigation and overflight in the South China Sea, canvassing a number of legal and policy recommendations to minimise potential incidents involving the passage of sovereign immune vessels and aircraft in the region.

Chapter Ten is the concluding chapter. It reiterates the key findings of the thesis and then recommends a number of areas that require further research in order to advance maritime safety and the freedoms of navigation and overflight, not only in the South China Sea region but in all ocean spaces.

2 GEOPOLITICAL CONSIDERATIONS OF THE SOUTH CHINA SEA

2.1 Introduction

The South China Sea is not only rich in living and non-living resources, but also connects to important Straits, particularly the Malacca and Singapore Straits. Indeed, more than half of the world's oil tankers and total cargo tonnage passes through these two Straits each year, making the South China Sea a critical international sea line of communication.¹ In addition to commercial shipping, military vessels and aircraft of littoral and extra-regional States transit through and conduct military operations in this particular region. Therefore, maintaining stable security and freedom of navigation and overflight in and over the South China Sea is critical to the interests of many States. However, as a semi-enclosed sea which contains hundreds of small islands, rocks and submerged features (many of which are subject to sovereignty disputes between littoral States), coupled with unresolved, overlapping and legally questionable maritime claims by a number of littoral States, the South China Sea is “among the most geographically and geopolitically complex ocean spaces in the world.”² Unfortunately, these longstanding maritime and territorial disputes, as well as conflicting interpretations of international law by certain States, have made the South China Sea vulnerable to maritime conflicts.

This chapter will outline geopolitical considerations affecting the South China Sea. Particular attention will be given to: (i) the geographical limits of the South China

¹ David Rosenberg, 'Governing the South China Sea: from Freedom of the Seas to Ocean Enclosure Movements' (2010) XII(3&4) *Harvard Asia Quarterly* 4, 7; see also Nong Hong, 'Maritime Trade Development in Asia: A Need for Regional Maritime Security Cooperation in the South China Sea' in Wu Shicun and Zou Keyuan (eds), *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (Ashgate, 2009) 42.

² Clive Schofield, 'What's at stake in the South China Sea? Geographical and geopolitical considerations' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) 11.

Sea; (ii) the economic and strategic significance of the region, (iii) unresolved territorial disputes and associated maritime claims, including disputes over access to resources; and (iv) the different interpretations of international law regarding navigation and overflight by certain States. Moreover, the chapter will highlight the burgeoning growth of naval powers and maritime law enforcement capabilities, as well as the concomitant increase in the potential for maritime incidents.

2.2 Geographical limits and the significance of the South China Sea

2.2.1 Geographical limits of the South China Sea

The South China Sea is a semi-enclosed sea³ surrounded by China, Taiwan and a number of Southeast Asian States. Located in the centre of East Asia, it is a vital sea lane that links much of East Asia to the rest of the world. The limits of the South China Sea are not well defined, being contested even today.⁴ The International Hydrographic Organization (IHO), in its 1953 special publication titled *Limits of Ocean and Seas* (also known as IHO S-23), defined the South China Sea as including the Strait of Taiwan, the Gulf of Tonkin and the Natuna Sea⁵ (see, for example, figure 2.1 for the limits of the South China Sea, cited in the U.S Energy Information Administration).

The third and latest edition of IHO S-23 was published in 1953. Unsurprisingly, there have been many changes to areas indicated in the document since that time, as well as name changes to water bodies and their adjacent land features. Indeed, these changes have rendered the third edition somewhat antiquated. The draft 4th edition of IHO S-23 was submitted to the IHO in 2002, but is yet to be approved. As IHO S-23 is

³ Article 122 of the United Nations Convention on the Law of the Sea 1982 (hereafter LOSC) defines enclosed or semi-enclosed seas as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”

⁴ Chris Rahman and Martin Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' (2010) 41(4) *Ocean Development & International Law* 315, 316.

⁵ International Hydrographic Organization, *Limits of Oceans and Seas* (IHO, 3rd ed, 1953) 30-31.

a purely technical publication, it cannot be used for legal purposes in any sovereignty dispute or in support of any maritime claim. In fact, the sensitivity of the subject is the major obstacle to the draft 4th edition being approved.⁶

For the purposes of this research, the limits of the South China Sea are those designated in the draft 4th edition of IHO S-23. As a result, the South China Sea is a semi-enclosed sea covering an area of almost three million square kilometres and surrounded by seven States and territories, China, Taiwan, the Philippines, Malaysia, Brunei, Indonesia and Vietnam⁷ (Figure 2.2).

Figure 2.1 Limits of the South China Sea

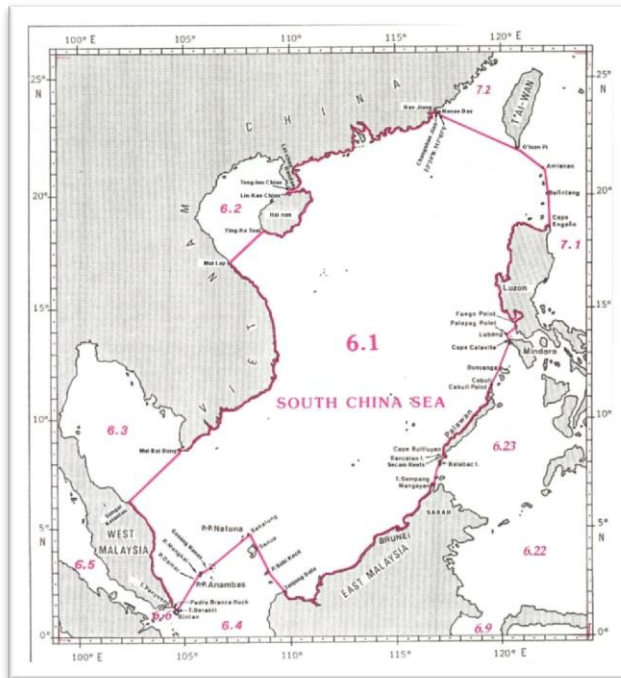


Source: U.S. Energy Information Administration

⁶ IHO Working Group, 'Final Report of S-23 Working Group to Member States' (June 2012).

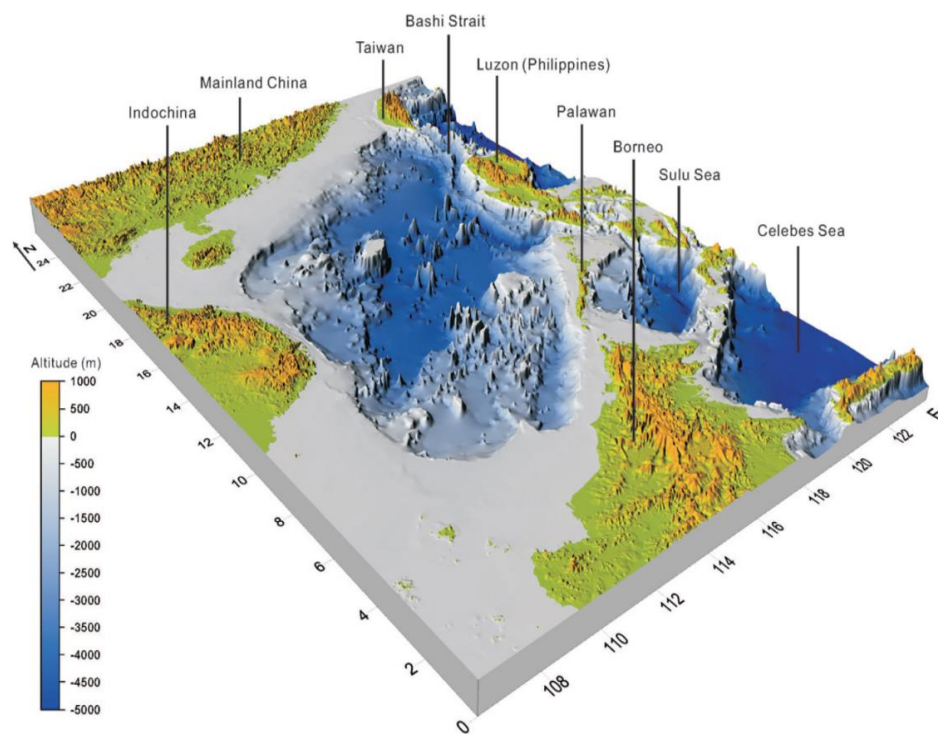
⁷ Rahman and Tsamenyi, above n 4, 316. For the geographic limitation of the research area, the new limits of the South China Sea as designated in the 4th edition of IHO S-23 will be used; hence, Singapore is not included as a South China Sea littoral State.

Figure 2.2 New Limits of the South China Sea (draft 4th edition of IHO)



Source: extracted from IHO S-23 (draft 4th edition)

Figure 2.3 Bathymetric map of the South China Sea



Source: Wang, Pinxian and Li, Qianyu (eds), *The South China Sea: Paleoceanography and Sedimentology* (Springer, 2009), 506

Bathymetrically, the South China Sea can be divided into two portions: the deep sea basin in the north-east and the broad continental shelves in the north-western and southern sides. The deep sea basin covers approximately 52 per cent of the area, exhibits a confused topography and has an average water depth of 4300m. The broad continental shelves cover approximately 48 per cent of the area, and have a water depth of less than 200m (Figure 2.3).⁸ The vast majority of these broad shelves lie within the claimed exclusive economic zones (EEZs) of China, Vietnam, Malaysia, and the Philippines.

There are more than 250 small offshore features located in the middle of the South China Sea, including islands, rocks, reefs, shoals, and atolls.⁹ The total number of features in the region is unavailable, as most are submerged at high tide and only some are capable of being classified as islands under the United Nations Convention on the Law of the Sea (LOSC).¹⁰ The majority of these offshore features are located in five groups: the Pratas Islands, the Scarborough Shoal, Macclesfield Bank, the Paracel Islands, and the Spratly Islands. Claims to territorial sovereignty over these five groups by States surrounding the South China Sea are overlapping and difficult to resolve. Moreover, along the coastlines of littoral States, there are many small uncontested islands which littoral States have used as basepoints to establish straight baselines, thus

⁸ Mark J Valencia, 'The South China Sea: Prospects for Marine Regionalism' (1978) 2(2) *Maritime Policy* 87, 87.

⁹ Sonika Gupta, 'Emerging Security Architecture in Southeast & East Asia: Growing Tensions in the South China Sea' (2013) (213) *ISPS Issue Brief* 1, 2.

¹⁰ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994), art 121. Article 121 of the LOSC defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide". The status of these offshore features is discussed in the following sections of this Chapter.

extending their maritime claims. This practice has attracted international protests by a number of States.¹¹

The geographical complexity of the South China Sea, coupled with the uncertainty in the international legal regime concerning islands, territorial sea baselines, historic waters and historic rights, and the freedom of navigation, constitute the main sources of tension and potential conflict between littoral States on the one hand, and between littoral States and extra-regional players on the other.

2.2.2 The significance of the South China Sea

2.2.2.1 The economic significance of the South China Sea

The South China Sea provides approximately ten per cent of the world's fisheries catch, with fisheries production being an important source of revenue for littoral states.¹² In 2010, China produced approximately 15.7 million tons of captured fish, which accounted for 32 per cent of the total catch production for the Asia Pacific region that year. To put that figure into perspective, the combined capture production of *all* Southeast Asian countries in 2010 was 17.3 million tons.¹³ More than 1.77 million fishing vessels operate in the South China Sea, with 3.73 million people being employed in the fisheries sector in the region.¹⁴ In 2010, the marine and brackish fish production of Southeast Asian countries reached a reported value of USD\$11.8 billion, while China's aquaculture production reached 48 million tons, worth USD\$63 billion

¹¹ Clive Schofield, 'Adrift on complex waters: Geographical, geopolitical and legal dimensions to the South China Sea disputes' in Leszek Buszynski and Christopher B Roberts (eds), *The South China Sea Maritime Disputes: Political, Legal and Regional Perspectives* (Routledge, 2015) 26.

¹² UNEP, 'Procedure for Establishing a Regional System of Fisheries Refugia in the South China Sea and Gulf of Thailand in the context of the UNEP/GEF project entitled "Reserving Environmental Degradation Trends in the South China Sea and Gulf of Thailand" in *South China Sea Knowledge Document* (UNEP, 2007) 1.

¹³ Simon Funge Smith, Matthew Briggs and Weimin Miao, *Regional Overview of Fisheries and Aquaculture in Asia and the Pacific 2012* (RAP Publication, 2012), 2-3.

¹⁴ Ibid 25-27.

(of which marine and brackish aquaculture accounted for USD\$19 billion).¹⁵ According to the Agricultural Outlook 2013-2022 prepared by the United Nations Food and Agriculture Organization (FAO), China's capture and aquaculture fisheries production is expected to reach 69 million tons by 2022.¹⁶ As all the littoral states of the South China Sea are developing countries, fishing and aquaculture industries remain an important revenue source for their national economies.

Besides living resources, the South China Sea is believed to be rich in hydrocarbon deposits, even though there is no precise evidence to support this claim. It is difficult to quantify the amount of oil and gas reserves in the South China Sea due to territorial disputes and technological limitations. Even so, the U.S. Energy Information Administration has estimated the amount of oil and natural gas reserves in the South China Sea to be approximately 11 billion barrels and 190 trillion cubic feet respectively.¹⁷ However, in 2010 the United States Geological Survey estimated that the South China Sea may contain between 5 and 22 billion barrels of oil and between 70 and 290 trillion cubic feet of gas in undiscovered resources.¹⁸ The estimates proposed by the China National Offshore Oil Company (CNOOC) in November 2012 exceed those of the two U.S. organisations, with the CNOOC proffering estimates of 125 billion barrels of oil and 500 trillion cubic feet of natural gas in undiscovered resources.¹⁹ There is, of course, a difference between *recoverable reserves* and *resources*. The term *resources* refers to the total amount of hydrocarbons deposited in the region, while the *recoverable reserves* represent only a fraction of the resources that

¹⁵ Ibid 110-115.

¹⁶ Food and Agriculture Organization (FAO), 'Feeding China: Prospects and challenges in the next decade' in *OECD-FAO Agriculture Outlook 2013: Highlights* (OECD-FAO, 2013) , 80.

¹⁷ US Energy Information Administration, *South China Sea* (7 February 2013)

<<http://www.eia.gov/countries/regions-topics.cfm?fips=SCS>>.

¹⁸ Ibid.

¹⁹ Ibid.

are capable of being economically recovered using current technologies.²⁰ Even though the amount of hydrocarbon reserves in the South China Sea is difficult to determine, the general consensus is that such reserves are significant.

Conventional hydrocarbon production is an important contributor to the economies of littoral States. However, due to territorial disputes, geological challenges, technical limitations, as well as unfavourable meteorological and hydrographical conditions, the exploration of hydrocarbons in the South China Sea by littoral states has thus far been limited. The table below shows the oil and natural gas produced by littoral States in 2011 in the South China Sea.

Table 2.1 Estimated conventional hydrocarbon production in the South China Sea by littoral States in 2011

Countries	Oil production (barrels/day)	Natural gas production (billion cubic feet)
Brunei	120,000	400
China	250,000	600
Indonesia	600,000	200
Malaysia	500,000	1,800
Philippines	25,000	100
Vietnam	300,000	300

Source: extracted from U.S. Energy Information Administration

Apart from its natural resources, the South China Sea is the world's second busiest international sea lane, linking the Pacific Ocean to the Indian Ocean. The value of seaborne trade passing through the South China Sea is approximately USD\$5.3 trillion per year, of which the U.S. share is approximately USD\$1.2 trillion.²¹ Of the top ten container ports in the world, eight are located in countries bordering the South China

²⁰ Nick A Owen and Clive H Schofield, 'Disputed South China Sea hydrocarbons in perspective' (2012) 36(3) *Maritime Policy* 809, 813.

²¹ Vladimir Odintsov, *American and Japanese military bases on the Phillipine soil* (05 July 2013) New Eastern Outlook <<http://journal-neo.org/2013/07/05/american-and-japanese-military-bases-on-the-phillipine-soil/>>.

Sea.²² Indeed, more than 60 per cent of Japan's oil imports transit through the region's waters,²³ and nearly 15 per cent of South Korea's crude oil moves through the South China Sea in order to reach its final destination.²⁴ In 2010, China imported 51.3 per cent of its oil consumption, with 77 per cent of this imported oil passing through the Strait of Malacca and then the South China Sea.²⁵ The South China Sea is also used for trade between Southeast Asian countries, as well as for trade between Southeast Asian States and the rest of the world.

In summary, as a semi-enclosed sea located in the centre of East Asia, the South China Sea represents an important fishing ground, a rich repository of hydrocarbon resources, and a vital sea lane that sustains regional and global trading relations.

2.2.2.2 The strategic significance of the South China Sea

The geographical location of the South China Sea also gives it special strategic significance. As many countries in the Asia-Pacific region rely heavily on seaborne trade, the security of South China Sea sea lines of communication (SLOC) is pivotal to the economies of littoral states as well as other maritime countries. Any disruption to seaborne trade would pose a significant threat to the region's economies. The South China Sea is not only important for merchant shipping, but also for military transits and operations. For many years, the United States Navy has utilised the South China Sea to transit forces between the Pacific Ocean and the Indian Ocean and Persian Gulf. Other regional States also use the South China Sea for their naval transits and operations.²⁶

²² *Top 50 World Container Ports* (12 October 2013) World Shipping Council
<<http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports>>.

²³ Takeshi Yuzawa, *Japan's Security Policy and the ASEAN Regional Forum: the Search for Multilateral Security in the Asia-Pacific* (Routledge, 2007) 46.

²⁴ US Energy Information Administration, above n 17.

²⁵ Jhong Xiang Zhang, 'China's energy security, the Malacca dilemma and responses' (2011) 39(12) *Energy Policy* 7612, 7613.

²⁶ Rahman and Tsamenyi, above n 1, 318.

States in the region are interested in the security of South China Sea SLOC; however, they have different perceptions of its significance. Maintaining the safety and freedom of navigation and overflight in the South China Sea are key strategic interests for many maritime powers, especially the United States, Japan, Australia and India. China, on the other hand, is not only concerned about the security of its seaborne trade through the South China Sea, but also its military defence strategy. China can potentially assert its dominance in the region, as well as effectively support its strategy of “offshore water defence” and “open seas protection”²⁷, by controlling the South China Sea. Indeed, once China gains such control, it will be perfectly placed to use this maritime region as a secure operating environment for its submarines based at Hainan Island.²⁸

There are a number of offshore island groups, particularly the Paracel Islands, the Spratly Islands and Scarborough Shoal, which are subject to sovereignty disputes between littoral States of the South China Sea. These tiny features are mainly uninhabited and difficult to defend; however, according to James Holmes, they could provide a “sea-denial option vis-à-vis passing merchant or naval traffic.”²⁹ China has strengthened its maritime forces, including naval and law enforcement vessels and aircraft, as well as civilian fishing vessels, in an effort to bolster its expansive maritime claims in the South China Sea. Other South China Sea littoral States have also increased

²⁷ Since 1980, China’s naval strategy has shifted from limited coastal defensive operations to offshore defensive operations. China’s Defence White Paper 2015 explicitly mentions this shift from “offshore waters defense” to a combination of “offshore waters defense” with “open seas protection”. See *China’s National Defence in 2008* (Information Office of the State Council of the People’s Republic of China, 2009); *The Diversified Employment of China’s Armed Forces* (The Information Office of the State Council, The People’s Republic of China, 2013); see also Leszek Buszynski, ‘Chinese Naval Strategy, the United States, ASEAN and the South China Sea’ (2012) 8(2) *Security Challenges* 19; *Full Text: China’s Military Strategy* (26 May 2015) Xinhuanet <http://news.xinhuanet.com/english/china/2015-05/26/c_134271001_4.htm>.

²⁸ Ronald O’Rourke, ‘Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress’ (Congressional Research Service, 5 August 2014), 16; see also Buszynski, above n 27, 23.

²⁹ James R Holmes, ‘Strategic Features of the South China Sea’ (2014) 67(2) *Naval War College Review* 31, 40.

their defence spending, focusing on naval and coast guard assets in order to protect their maritime claims in the region.

Due to the geostrategic complexity of the South China Sea, it seems that States are unlikely to reach a compromise with regard to their maritime claims. Indeed, the increase in the number of naval and law enforcement vessels and aircraft operating in the South China Sea is evidence of the desire of these States to strengthen their territorial sovereignty and associated maritime claims. However, the willingness of regional States to protect their interests has resulted in a number of maritime incidents. Unfortunately, no effective measures have been devised to address these issues. As Robert Kaplan has opined, the South China Sea is at the “throat of global sea routes” but has “increasingly become an armed camp.”³⁰

2.3 Maritime disputes in the South China Sea

2.3.1 Disputes over offshore territorial claims in the South China Sea

Disputes over offshore territorial claims in the South China Sea are longstanding and complex. There are five major offshore features in the South China Sea. The designated groups of features are mostly composed of small islands, islets, rocks, cays, shoals and reefs, which make human habitation quite difficult (figure 2.4). However, their locations, combined with the maritime zones which they are potentially capable of generating, give them special economic and strategic importance.

³⁰ Robert D Kaplan, *The South China Sea is the Future of Conflict* (15 August 2011) Foreign Policy <<http://foreignpolicy.com/2011/08/15/the-south-china-sea-is-the-future-of-conflict/>>.

Figure 2.4 Islands in the South China Sea



Source: Arbitral Tribunal, Case N° 2013-19

2.3.1.1 The Pratas Islands

The Pratas Islands are located in the northern part of the South China Sea. This group of features includes Pratas Island and two submerged coral reefs: North Vereker Bank and South Vereker Bank. The diameter of this ring-shaped reef is approximately

13 miles.³¹ Taiwan occupied Pratas Island in 1946, and thus claims sovereignty over the entire group of features. Although China has never occupied any of these features, this has not prevented it from laying claim to the group. Pratas Island is located 240 nautical miles southwest of the Taiwanese coastline and 170 nautical miles southeast of Hong Kong. It is the largest offshore island in the South China Sea covering an area of approximately 2.4 square kilometres.³² Located at the gateway to the Strait of Taiwan and the Luzon Strait, Pratas Island is strategically located for the monitoring and controlling of shipping routes from the South China Sea to the East China Sea. For many years, Pratas Island has been used as a military outpost for the Taiwanese navy in the South China Sea. A runway and a small airport have also been built on this island. However, in January 2000, Taiwan replaced naval personnel stationed on Pratas Island with coast guard personnel.³³ In 2007, Taiwan designated Pratas Island as a national park, establishing an administrative office on the island in July 2010.³⁴

The dispute over the Pratas Islands involves only China and Taiwan. As China claims Taiwan as part of its territory, and Taiwan's sovereignty claims in the South China Sea are almost identical to those made by China, this overlapping claim is unlikely to result in conflict, at least for the time being.³⁵

³¹ National Geospatial Intelligence Agency, 'South China Sea and the Gulf of Thailand' in *Sailing Direction* (National Geospatial Intelligence Agency, 13th ed, 2011) 4.

³² Chang-feng Dai, 'Dong-sha Atoll in the South China Sea: Past, Present and Future ' (Paper presented at the ISLANDS of the WORLD VIII International Conference, Taiwan 1-7 November 2004).

³³ Yann-huei Song, 'Recent Development in the South China Sea: Taiwan's Policy, Response, Challenges and Opportunities' (Paper presented at the CSIS Conference for the Managing Tensions in the South China Sea, 5-6 Jun 2013), 4.

³⁴ John W Mcmanus, Kwang-tsao Shao and Szu-yin Lin, 'Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan' (2010) (41) *Ocean Development & International Law* 270, 276.

³⁵ See York W Chen, *The Dispute in the South China Sea and Taiwan's Approach* (December 2011) Tamkang University <<http://tkuir.lib.tku.edu.tw:8080/dspace/retrieve/52808/2011-DECEMBER%20The%20Dispute%20in%20the%20South%20China%20Sea%20and%20Taiwan'.pdf>>; see also Rongxing Guo, *Territorial Disputes and Resource Management: A Global Handbook* (Nova, 2007), 100.

2.3.1.2 The Paracel Islands

The Paracel Islands are located in the north-western part of the South China Sea, covering an ocean surface area of more than 16,000 square kilometres.³⁶ The Paracels consist of two main groups of islands: the western group (Amphitrite group) and the eastern group (Crescent group). From the 1950s, the Republic of Vietnam (South Vietnam) occupied and exercised control over the western group, while China controlled the eastern group.³⁷ However, in 1974 China forcibly seized the western group from South Vietnam, and has controlled all of the Paracels since that time.³⁸ Moreover, China has unilaterally applied straight baselines around the archipelago.³⁹ These straight baselines are totally inconsistent with international law, as under the LOSC only mid oceanic archipelagic States that fulfil specific criteria on land to water ratios can draw straight baselines (known as archipelagic baselines) around their islands.⁴⁰

There are approximately 35 features in this archipelago, including islands, islets, reefs and cays.⁴¹ The largest island is Woody Island, which covers an area slightly larger than 2 square kilometres.⁴² China, Taiwan and Vietnam all claim

³⁶ Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claims' (2012) (1) *Journal of East Asia and International Law* 165, 167.

³⁷ Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claims' (2012) (1) (May 4) *Journal of East Asia and International Law* 168, 169.

³⁸ Ibid 189.

³⁹ See *Declaration of the Government of the People's Republic of China on the baselines of the territorial sea* (15 May 1996) United Nations
<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>.

⁴⁰ LOSC, arts 46 & 47; see also Robert C. Beckman and Clive H. Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) *The International Journal of Marine and Coastal Law* 193, 196.

⁴¹ Robert Beckman, 'The South China Sea: the evolving dispute between China and her maritime neighbours' (2013) 21(3) *Geomatics World* 17, 18.

⁴² Ibid.

sovereignty over the Paracel Islands.⁴³ Vietnam endorses the one-China policy, and thus does not recognise Taiwan as a State. For this reason, no formal diplomatic relations exist between Vietnam and Taiwan.⁴⁴ Accordingly, Vietnam views the dispute over the Paracels as a bilateral dispute between Vietnam and China. Since its occupation, China has set about constructing and gradually upgrading its infrastructure on Woody Island, which includes a military airstrip over 2,500 metres in length to accommodate fighter aircraft operations.⁴⁵ An artificial harbour which is capable of accommodating Chinese warships, including frigates and destroyers, has also been built on Woody Island.⁴⁶ In 2016, China deployed HQ-9 surface-to-air missiles and J-11 fighter jets to Woody Island, thereby allowing the State to “bolster its strategic foothold in the Paracel Islands.”⁴⁷ This move was strongly protested by Vietnam. Indeed, Vietnam’s Foreign Ministry spokesman, Le Hai Binh, branded China’s actions as “serious infringements of Vietnam’s sovereignty over the Paracels, threatening peace and stability in the region as well as security, safety and freedom of navigation and flight.”⁴⁸

2.3.1.3 Macclesfield Bank

Macclesfield Bank consists of a group of submerged shoals and reefs located in the centre of the South China Sea, between the Paracel Islands and Scarborough

⁴³ See Nguyen Thi lan Anh, 'Origins of the South China Sea Dispute' in Jing Huang and Andrew Billo (eds), *Territorial Disputes in the South China Sea* (Palgrave Macmillan, 2015) for a detailed discussion of territorial sovereignty disputes in the South China Sea.

⁴⁴ Hong Thao Nguyen, 'Managing Vietnam’s Maritime Boundary Disputes' (2007) 38(3) *Ocean Development and International Law* 305, 310.

⁴⁵ Clarence J Bouchat, *The Paracel Islands and U.S. Interests and Approaches in the South China Sea* (U.S. Army War College Press, 2014), 18.

⁴⁶ Ibid.

⁴⁷ Ashley Townshend, *The strategic significance of China's Woody Island power play* (1 March 2016) The Interpreter <<http://www.lowyinterpreter.org/post/2016/03/01/The-strategic-significance-of-Chinas-Woody-Island-power-play.aspx>>.

⁴⁸ Martin Petty and Colin Packham, *Vietnam protests China missile deployment, Australia, NZ urge restraint* (19 February 2016) Reuters <<http://www.reuters.com/article/us-southchinasea-china-idUSKCN0VS0AG>>.

Shoal.⁴⁹ As this feature is totally submerged, it cannot form the subject of any sovereignty claim under international law.⁵⁰ Both China and Taiwan have claimed this bank, even though no country can effectively occupy it. Taiwan is neither a member of the United Nations nor a party to the LOSC. As such, Taiwan has not been invited to any official regional security forum, or formed part of any official regional effort to address maritime issues in the South China Sea. For this reason, it is difficult for Taiwan to assert any maritime claim in the region.⁵¹ Adding to this difficulty is China's claim that Taiwan has always formed part of its territory. However, in the context of the wider South China Sea disputes, the clash over Macclesfield Bank is unlikely to result in an escalation of tensions.

2.3.1.4 Scarborough Shoal

Scarborough Shoal is a large atoll surrounded by a reef and with an inner lagoon stretching 150 square kilometres.⁵² The largest rock located on this shoal is South Rock, which is 1.8 metres above water at high tide.⁵³ Scarborough Shoal is located within the mainland EEZ claimed by the Philippines, approximately 124 nautical miles from Zambales Province in the Philippines and 472 nautical miles from the Chinese coast.⁵⁴

⁴⁹ O'Rourke, above n 28, 3.

⁵⁰ The LOSC does not contain any provisions regarding submerged features. Article 121 defines rocks and islands, while article 13 defines low-tide elevations. Robert Beckman has suggested that submerged features are not capable of forming the subject of a sovereignty claim because they are part of the seabed, not land; see Robert Beckman, 'Legal Status of Low Tide Elevations and Submerged Features' (Paper presented at the International Seminar on Geographic Features in the East Asia Seas and the Law of the Sea, Taipei, Taiwan, 2012).

⁵¹ Yann Huei Song, 'Territorial and Maritime Disputes in East Asia: Recent Developments and their Implications for Cross-Strait Relations' (Paper presented at the New Situation and Prospects in the Development of Cross-Strait Relations, Washington DC, USA, 2013), 13; see also York W Chen, above n 35.

⁵² Zou Keyuan, 'Scarborough Reef: a new flashpoint in sino-philippine relations?' (1999) 7(2) *IBRU Boundary and Security Bulletin* 71, 71.

⁵³ Ibid.

⁵⁴ Robert Beckman, 'Scarborough Shoal: Flashpoint for Confrontation or Opportunity for Cooperation?' (2012) 7(2012) *RSIS Commentaries* 1, 1.

There are five rocks in this area that are visible above the water at high tide.⁵⁵ With regard to sovereignty, the Shoal has been claimed by China, Taiwan and the Philippines. The Philippines maintains that it has exercised jurisdiction over Scarborough Shoal since 1946, with such jurisdiction being confirmed by the construction of a lighthouse by the Philippine government in 1965.⁵⁶ For China and Taiwan, Scarborough Shoal and Macclesfield Bank are parts of *Zhongsha Qundao*, even though these two groups of features are located more than 170 nautical miles apart from one another. Of all the features of *Zhongsha Qundao*, including Macclesfield Bank, Scarborough Shoal, Truro Shoal, Saint Esprit Shoal and Dreyer Shoal, only Scarborough Shoal is visible above water at high tide, and therefore this shoal is critically important to China's sovereignty claim over *Zhongsha Qundao*.⁵⁷

The waters around Scarborough Shoal, as well as those within the lagoon, are rich in marine living resources and constitute traditional fishing grounds for Chinese and Filipino fishermen. Besides these resources, Scarborough Shoal occupies a strategic location, as it sits in the vicinity of South China Sea SLOC. The dispute over Scarborough Shoal rose to prominence in 1997 when three Chinese fishing vessels were prevented from approaching the shoal by the Philippine Navy. In 2012, similar incidents between Chinese and Philippine vessels around the shoal intensified and persisted for several months. The shoal is currently controlled by China. On 23 January 2013, the Philippines requested that China bringing their dispute over the maritime jurisdiction in the South China Sea to the International Tribunal on the Law of the Sea (ITLOS) for arbitration in accordance with the dispute settlement provisions of the LOSC. China,

⁵⁵ Ibid.

⁵⁶ Ibid 2.

⁵⁷ Francois Xavier Bonnet, 'Geopolitics of Scarborough Shoal' 2012 (14) *Irasesec's Discussion Papers* 1, 5.

however, rejected this proposal.⁵⁸ In October 2015, an arbitral tribunal established in accordance with Annex VII of the LOSC, decided that it possessed the necessary jurisdiction to hear the matter without China needing to participate.⁵⁹ However, it is important to note that the arbitral tribunal could only rule on maritime zones that are generated from disputed features; it could not resolve sovereignty disputes over the features themselves. On 12 July 2016, in its final decision, the arbitral tribunal declared that Scarborough Shoal is a “rock” for the purpose of Article 121(3) of the LOSC.⁶⁰ It follows from this decision, that this feature is only capable of generating a territorial sea and not an exclusive economic zone.

2.3.1.5 The Spratly Islands

The Spratly Islands are located in the south-eastern part of the South China Sea. This group of islands consists of more than 150 features, including islands, islets, rocks, reefs, and shoals; however, only 36 of them are above water at high tide.⁶¹ The total land area of this group of features is less than 8 square kilometres, with Itu Aba Island, the largest island in the group, covering an area of only half a square kilometre.⁶² Although the total land area of the group is unremarkable, the ocean surface area of the entire archipelago is almost 240,000 square kilometres.⁶³ So although the islands themselves are very small and unable to sustain human habitation, the maritime zones

⁵⁸ Gregory B Poling, *Manila Begins Legal Proceedings over South China Sea Claims* (24 January 2013) Center for Strategic and International Studies <<http://csis.org/publication/manila-begins-legal-proceedings-over-south-china-sea-claims>>; Nizam Basiron, Sumathy Permal and Melda Malek, 'Philippines arbitral proceedings against China' (2013) 5(1) *Australian Journal of Maritime and Ocean Affairs* 37, 37-8; see also Carlyle A Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea' (2013) 33(2) *SAIS Review of International Affairs* 75, 80.

⁵⁹ See *Award on Jurisdiction and Admissibility (Republic of the Philippines and People's Republic of China)* [2015] PCA Case N° 2013-19.

⁶⁰ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [554].

⁶¹ Clive H Schofield, 'Island disputes and the "oil factor" in the South China Sea disputes' (2012) (4) *Current Intelligence* 3, 3.

⁶² *Ibid.*

⁶³ *Ibid.*

that may potentially be generated from these islands are huge, making the Spratly Islands highly significant for littoral States. Located close to major sea lanes used for both commercial and military purposes, the Spratly archipelago holds a special strategic location in this particular maritime domain. During the Second World War, the Japanese effectively used Itu Aba Island as a submarine base and military outpost for monitoring and intercepting allied vessels passing through the South China Sea.

After the Second World War, and particularly after the San Francisco Treaty of Peace was signed in 1951, Japan renounced its sovereignty over a number of islands in the Pacific Ocean and the South China Sea, including the Spratly Islands.⁶⁴ Indeed, post-World War II, China, Vietnam and the Philippines all claimed sovereignty over some or all of the Spratly islands. However, the San Francisco Treaty of Peace did not designate the Spratly Islands as belonging to any of these claimant States.⁶⁵

Currently, China, Taiwan and Vietnam claim the whole archipelago, while Malaysia, the Philippines and Brunei claim certain parts of it. The legal bases for China's, Taiwan's and Vietnam's sovereignty claims over the Spratly Islands are based on historical evidence, while the Philippine claim is based on its discovery of certain islands within the Spratlys. Malaysia and Brunei have justified their claims based on the continental shelf provisions set out in the LOSC.⁶⁶ With the exception of Brunei, which only claims Louisa Reef, all the claimant States have a military presence in the archipelago. Vietnam occupies a total of 21 islands, reefs and cays, China occupies eight reefs and rocks, Taiwan occupies Itu Aba Island, the Philippines occupies nine

⁶⁴ Gerado M C Valero, 'Spratly archipelago dispute: is the question of sovereignty still relevant?' (1994) 18(4) *Maritime Policy* 314, 331.

⁶⁵ Ibid.

⁶⁶ Christopher C Joyner, 'The Spratly Islands Disputes: Legal Issues and Prospect for Diplomatic Accommodation' in Baker John C and Wiencek David G (eds), *Cooperative Monitoring in the South China Sea: Satellite Imagery, Confidence Building Measures, and the Spratly Islands Disputes* (Greenwood Press, 2002) ,19-21.

islands, and Malaysia occupies three islands.⁶⁷ Of these six claimant States, China is the only country that has asserted its control through the use of military force. In 1988, China attacked Vietnamese naval dispositions stationed on certain features of the Spratlys, killing 70 Vietnamese sailors and, for the first time, seizing control of these features.⁶⁸ China recently carried out an extensive building program on its occupied features in the Spratly Islands – one which included the construction of artificial islands and airstrips. In doing so, China ignored the protests and warnings of several regional States.⁶⁹ Moreover, in a *Note Verbale* to the Secretary-General of the United Nations on 14 April 2011, China stated that “China’s Nansha Islands (Spratly Islands) is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.”⁷⁰ Other claimant States have not provided any official statement regarding maritime zones which might be generated from the Spratly Islands. It is worth noting that on 12 July 2016, in its South China Sea Arbitration Award, the arbitral tribunal declared that none of the features of the Spratly Islands are capable of sustaining human habitation or economic life of their own, and therefore such features are not entitled to an exclusive economic zone or continental shelf.⁷¹ China, however, rejected the arbitral tribunal’s award, with the State’s Foreign Minister Wang Yi propounding that “the award is null

⁶⁷ Christopher C Joyner, 'The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea' (1998) 13(2) *The International Journal for Marine and Coastal Law* 193, 204.

⁶⁸ David G Wien and John C Baker, 'Security Risk of a South China Sea Conflict' in Baker John C and Wiencek David G (eds), *Cooperative Monitoring in the South China Sea: Satellite Imagery, Confidence Building Measures, and the Spratly Islands Disputes* (Greenwood Press, 2002) , 49-50.

⁶⁹ David Brunnstrom, *Images show rapid Chinese progress on new South China Sea airstrip* (17 April 2015) Reuters <<http://www.reuters.com/article/2015/04/17/us-southchinasea-china-runway-idUSKBN0N723Y20150417>>.

⁷⁰ People's Republic of China, *Note Verbale CML/8/2011* (14 April 2011) United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>.

⁷¹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [626].

and void and has no binding force.”⁷²

The unresolved sovereignty disputes over these offshore features, together with clashes over natural resources and overlapping maritime zones, constitute the main flashpoints for potential maritime conflict between the relevant States.

2.3.2 Disputes over maritime boundaries

In addition to their disputes over insular and other features in the South China Sea, most countries surrounding the South China Sea have overlapping maritime claims to offshore maritime zones.

In the southern part of the South China Sea, Vietnam, Indonesia, Malaysia and Brunei have overlapping EEZs and continental shelf claims. The majority of the overlapping continental shelves between Malaysia and Indonesia have been delimited.⁷³ Although the overlapping continental shelf claimed by Vietnam and Malaysia in the South China Sea has not yet been delimited, in 2009 the two countries made a joint submission to the United Nations Commission on the Limits of the Continental Shelf (CLCS) for the overlapping section.⁷⁴ This joint submission was protested by China, Taiwan and the Philippines. In addition to its joint submission with Malaysia, Vietnam submitted its own extended continental shelf claim in the northern part of the South China Sea.⁷⁵ China and the Philippines submitted *Note Verbales* to the CLCS in protest

⁷² Quoted in Prangthong Jitcharoenkul, *Beijing rejects UN court's ruling* (13 July 2016) Bangkok Post <<http://www.bangkokpost.com/news/asean/1034269/beijing-rejects-un-courts-ruling>>.

⁷³ Gregory B Poling, 'The South China Sea in Focus: Clarifying the Limits of Maritime Dispute' (CSIS Report, July 2013), 8.

⁷⁴ *Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea* (6 May 2009) United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf>.

⁷⁵ *Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982, Partial Submission in Respect of Vietnam's Extended Continental Shelf: North Area (VNM-N)* (7 May 2009) United Nations

of Vietnam's claim, while Taiwan, as a non-party to the LOSC, made a statement reiterating its territorial and maritime claims in the South China Sea.⁷⁶ China and Taiwan argue that this area is within the infamous "nine-dash line" claimed by China and Taiwan as "historic waters", while the Philippines maintains that this area is in dispute and overlaps with the Philippine claim.⁷⁷ The continental shelf boundary between Vietnam and Indonesia has already been delimited in an agreement signed by the two countries on 26 June 2003 (and which entered into force on 29 May 2007).⁷⁸ In 2009, Malaysia and Brunei reached an agreement in the form of an exchange of letters regarding maritime boundary delimitation.⁷⁹ It is interesting to note that, even though Malaysia and Brunei have already agreed on their EEZ boundary, the joint submission on the extended continental shelf between Vietnam and Malaysia covers the extended continental shelf claim of Brunei.⁸⁰

In the south-eastern part of the South China Sea, the maritime boundaries between Malaysia and the Philippines have not yet been delimited. For many years the Philippines maintained its maritime claims based on the Treaty of Paris, which is not consistent with the LOSC. As a result, maritime boundaries between the Philippines and other States could not be resolved. However, in 2009 the Philippines passed its baseline law, declaring that its territorial sea and EEZ extend to 12 nautical miles and 200

<http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf>

⁷⁶ People's Republic of China, *Note Verbale CML/17/2009*; Republic of Philippines, *Note Verbale 000819*; see also Statements (11 May 2009) Ministry of Foreign Affairs Republic of China, <<http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/890fb320-603c-49b2-a2cc-7842923e66c8?arfid=0b12b1ae-64ff-4e4b-b6bd-e20fbf2c7a13&opno=49be2475-017b-4647-8ac1-9a0ec20d892c>>.

⁷⁷ Ibid.

⁷⁸ *Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia concerning the delimitation of the continental shelf boundary*, signed on 26 June 2003 (entered into force on 29 May 2007).

⁷⁹ Jeffrey J Smith, 'Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues' (2010) 1 *ASIL Law of the Sea Reports* 1, 1-4.

⁸⁰ Poling, above n 73, 8-9.

nautical miles respectively from the straight baselines established by that law.⁸¹ By virtue of this enactment, the Philippines maritime claims in the South China Sea will likely have a sounder legal basis under international law, paving the way for maritime boundary agreements between the Philippines and its neighbours, particularly Malaysia and Taiwan.

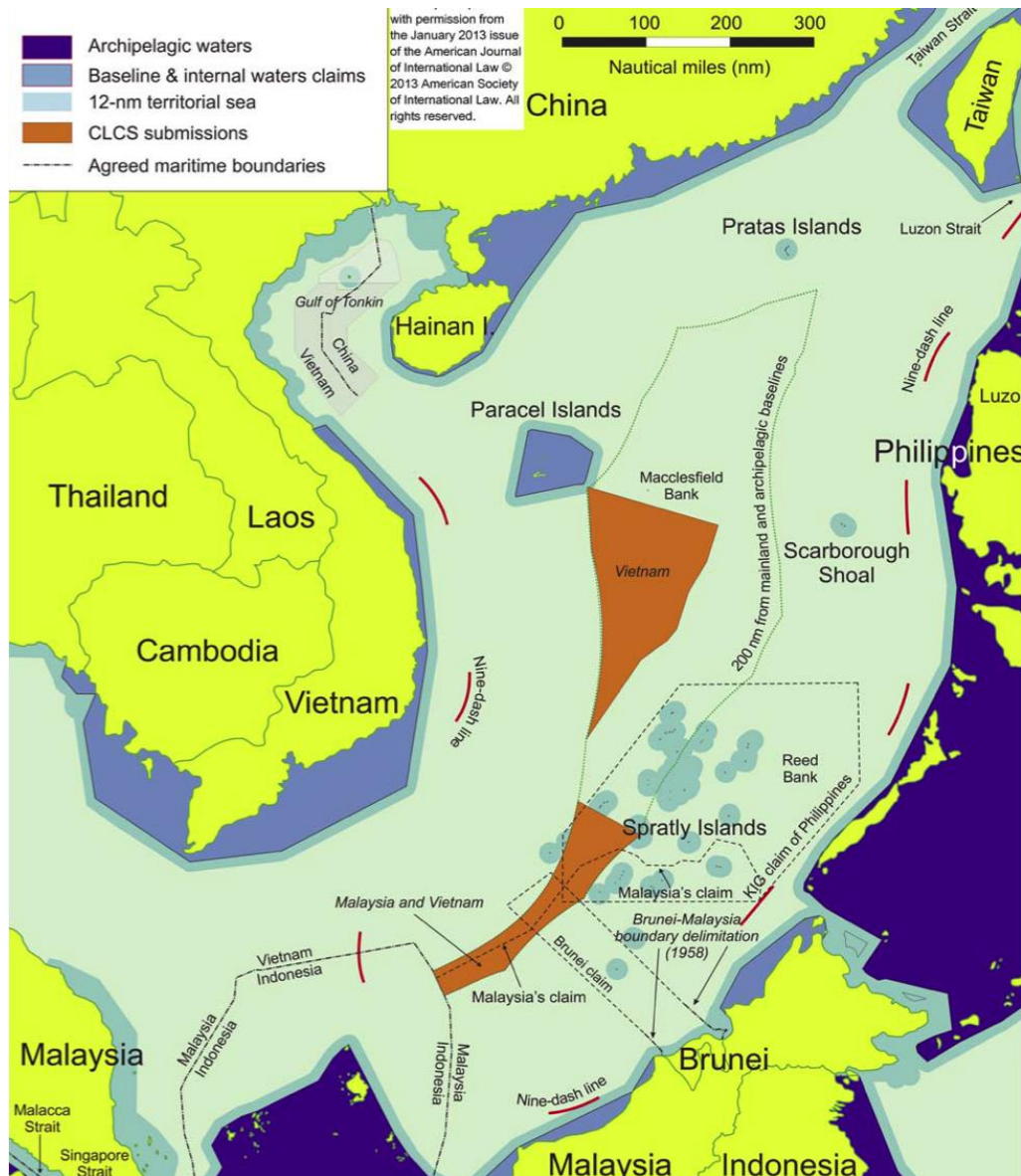
In the north part of the South China Sea, only one maritime boundary agreement has been reached. This agreement was signed between China and Vietnam in 2000, and focuses on the maritime boundary in the Gulf of Tonkin.⁸² Perhaps the main obstacle to other maritime boundaries being delimited in the region are the unresolved disputes between China and Vietnam over the Paracel Islands, as well as those between China, Taiwan and the Philippines over Scarborough Shoal as previously discussed.

If States were prepared to ignore small offshore features when making maritime claims, and if littoral States agreed to delimit their maritime boundaries using the equidistance method, then maritime boundary delimitation would likely be a much simpler task. Indeed, if this were the case, there would be an area in the middle of the South China Sea that could be classified as high seas under the LOSC (see figure 2.5). Of course, it is highly unlikely that claimant States would be willing to relinquish their territorial claims over these small but strategically located offshore features. The situation would be further complicated if these small offshore features were treated as islands capable of generating their own territorial seas and EEZs. If so, all the waters of the South China Sea would be under the jurisdiction of littoral states, and there would be no high seas.

⁸¹ Ibid 10.

⁸² Hong Thao Nguyen, 'Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf of Tonkin' (2005) 36 *Ocean Development & International Law* 25, 25.

Figure 2.5 Maritime boundaries in the South China Sea



Source: Andi Arsana and Clive Schofield, Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia

In addition to the above problems, China has complicated boundary delimitation in the South China Sea by introducing the so-called “nine-dash line” - an area which covers almost the whole South China Sea area and over which China claims jurisdiction. The nine-dash line claim was officially made by China in 2009 in response

to a joint submission by Vietnam and Malaysia on their extended continental shelves.⁸³ Vietnam responded to China's claim by stating that the map "has no legal, historical or factual basis, [and] therefore is null and void."⁸⁴ Indonesia issued a statement saying that China's nine-dash line map "clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982."⁸⁵ Meanwhile, the Philippines requested the arbitral tribunal established under Annex VII of the LOSC to issue an award to the effect that "China's maritime claims in the SCS based on its so-called nine-dash line are contrary to UNCLOS and invalid."⁸⁶ The original dashed line map contained 11 dashes and was published in 1947 by the Republic of China (Taiwan) under the title "Map of South China Sea Islands." However, two dashes within the Gulf of Tonkin were later removed from the map, hence its current name.⁸⁷ It is important to note that China has never published the geographical coordinates of the dashes, nor has it provided any official explanation as to the implications or the nature of the nine dash-line map. Many analysts have disputed the legal and technical basis for the nine-dash line, and it continues to prove a major obstacle to dispute resolution in the South China Sea.⁸⁸ On 12 July 2016, in its South China Sea Arbitration Award, the arbitral tribunal declared that China has no legal basis to claim historic rights to resources within the nine-dash

⁸³ Poling, above n 73.

⁸⁴ Permanent Mission of the Socialist Republic of Vietnam to the United Nations, *Note Verbale No.86/HC 2009* (8 May 2009) United Nations
http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys_vnm_e.pdf.

⁸⁵ Permanent Mission of the Republic of Indonesia to the United Nations, *Note Verbale No.480/POL-703/VII/10* (8 July 2010) United Nations
http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

⁸⁶ Nizam Basiron, Sumathy Permal and Melda Malek, above n 58.

⁸⁷ United States Department of State *Limits in the Seas: China Maritime Claims in the South China Sea* (December 5, 2014).

⁸⁸ Melek has commented that the nine dash-line map "has little or no legal value for China to establish its sovereignty or historic right claim", see Melda Malek, 'A legal Assessment of China's historic claims in the South China Sea' (2013) 5(1) *Australian Journal of Maritime and Oceans Affairs* 28, 34; Florian Dupuy and Pierre Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 131-36; see also Bonnet, above n 57, 23.

line.⁸⁹ The decision of the arbitral tribunal is legally binding⁹⁰; however, as the tribunal does not have enforcement powers, it is unlikely that China will respect the ruling.

In summary, the strategic locations and maritime zones that may potentially be generated from offshore features, as well as the excessive maritime claims of littoral states (particularly China and Taiwan), represent the main impediments to maritime boundary agreements being struck in the South China Sea.

2.3.3 Disputes over access to resources

The South China Sea is not only a productive fishing ground but also an area of abundant hydrocarbon resources. As the majority of maritime boundaries in this region are yet to be delimited, disputes between littoral States over access to resources are commonplace.

In the southern part of the South China Sea, joint developments for the exploration of hydrocarbon resources by certain States have been achieved, and thus disputes over resources in this area are not as prevalent. However, in the northern and centre parts of the South China Sea, and particularly in those areas surrounding offshore features, consensus over boundary delimitation is unlikely. Disputes over access to resources in these overlapping maritime zones have created strained relations and flash points for potential maritime conflicts. In particular, with an increase in the number of incidents between Chinese law enforcement vessels and vessels of other littoral States,

⁸⁹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [278].

⁹⁰ LOSC, Annex VII, art 11; see also Sam Bateman et al, 'Assessing the South China Sea Award' (2016) 108(August) *Strategic Insights* 1, 1-2.

China appears to be adopting a more aggressive stance when seeking to assert its control over such resources.⁹¹

Since 1999, China has unilaterally instituted an annual fishing ban in the north-western part the South China Sea for several months, even though this area encompasses some marine areas under claimed Vietnamese jurisdiction.⁹² China has claimed that the purpose of this ban is to conserve marine stocks.⁹³ However, it could also be viewed as a strategic action by China to support its claims over these waters. The Vietnamese government has always regarded the Chinese unilateral fishing ban in the South China Sea as “null and void”,⁹⁴ with the vast majority of Vietnamese fishermen ignoring the ban altogether.⁹⁵ As a result, many Vietnamese fishing vessels have been arrested by Chinese patrol vessels. Indeed, between 2005 and 2012, more than 60 Vietnamese fishing boats were seized by Chinese law enforcement authorities in the South China Sea.⁹⁶ In 2012, China and the Philippines became embroiled in a two-month maritime standoff in the waters surrounding Scarborough Shoal due to a

⁹¹ See, eg, Carlyle A Thayer, 'China's New Wave of Aggressive Assertiveness in the South China Sea' (2011) 2(3) *International Journal of China Studies* 555, 573; Michael Yahuda, 'China's New Assertiveness in the South China Sea' (2013) 22(81) *Journal of Contemporary China* 446, 449-51.

⁹² The ban usually takes place from May to August between 12 degrees latitude north to the north and 113 degrees longitude east to the west. This area covers the Paracels and part of the Vietnamese EEZ. See, Hai Dang Vu, 'A Bilateral Network of Marine Protected Areas Between Vietnam and China: An Alternative to the Chinese Unilateral Fishing Ban in the South China Sea?' (2013) 44(2) *Ocean Development & International Law* 145, 146-7; see also *Vietnam dismisses China fishing ban in East Sea* (16 May 2013) *Thanhien News* <<http://www.thanhiennews.com/index/pages/20130516-vietnam-opposes-china-fishing-ban-on-east-sea.aspx>>.

⁹³ *Vietnam dismisses China fishing ban in East Sea*, above n 92.

⁹⁴ On 16 May 2013, Vietnamese Foreign Ministry spokesperson Luong Thanh Nghi stressed that “Vietnam opposes and declares China’s aforementioned unilateral decision null and void”. See Vu Quang Tiep, *Vietnam protests China's fishing ban in East Sea* (15 May 2013) *South China Sea Studies* <<http://southchinaseastudies.org/en/component/content/article/151-newsflash/841-vietnam-protests-chinas-fishing-ban-in-east-sea>>.

⁹⁵ *Vietnam dismisses China fishing ban in East Sea*, above n 92.

⁹⁶ Leszek Buszynski, 'The South China Sea: Oil, Maritime Claims and US-China Strategic Rivalry' (2012) (Spring) *The Washington Quarterly* 139, 143.

dispute over access to resources in this area.⁹⁷ Even though tensions were diffused by both sides engaging in diplomatic talks,⁹⁸ the risk of further confrontations remain, as the root causes of the disputes remain in place. Most recently, in March 2016 an Indonesian law enforcement vessel captured a Chinese fishing boat operating illegally in Indonesia's claimed EEZ within the South China Sea. A Chinese Coast Guard vessel arrived on the scene thereafter and rammed the fishing boat to free it from Indonesian authorities.⁹⁹ Indonesia lodged a formal protest with China's Embassy in Jakarta, but China responded by saying that the area where the incident took place was "traditional Chinese fishing grounds."¹⁰⁰ Under international law Indonesia has sovereign rights over both living and non-living resources in its claimed EEZ, while China's claim of "traditional Chinese fishing grounds" in the South China Sea is legally questionable. Nevertheless, disputes over access to living resources in the South China Sea represent an emerging issue – one fraught with risk and which has already resulted in violent clashes between the States concerned.

Access to oil and gas reserves is another aspect of the South China Sea disputes. Malaysia, Vietnam, and the Philippines are currently developing oil and gas fields in their EEZs and on their continental shelves, but these fields also lie within the so-called "nine-dash line" area claimed by China. Recently, disputes over access to oil and gas resources have led to increased tensions between China and other littoral States. Since

⁹⁷ Renato Cruz De Castro, 'China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff' (Paper presented at the Conference for the Managing Tensions in the South China Sea, CSIS 5-6 June 2013), 3.

⁹⁸ In June 2012, China and the Philippines agreed to withdraw all government vessels that had been stationed in the shoal's lagoon. See M Taylor Fravel, *How to Defuse South China Sea Conflicts* (26 Jun 2012) Wall Street Journal online <<http://ezproxy.uow.edu.au/login?url=http://search.proquest.com.ezproxy.uow.edu.au/docview/1022180293?accountid=15112>>.

⁹⁹ Joe Cochrane, *China's Coast Guard Rams Fishing Boat to Free It From Indonesian Authorities* (21 March 2016) New York Times <http://www.nytimes.com/2016/03/22/world/asia/indonesia-south-china-sea-fishing-boat.html?_r=0>.

¹⁰⁰ Ibid.

2007, China has warned foreign oil and gas companies to cease their joint exploration activities with Vietnam or face adverse consequences in their business relations with China.¹⁰¹ On 26 May 2011, three Chinese patrol vessels harassed a Vietnamese seismic survey ship, the *Binh Minh 02*, with one of the Chinese vessels intentionally cutting a submerged cable being towed by the *Binh Minh 02* in an area called Block 148, approximately 80 nautical miles from Vietnam's south-central coast and well within the State's claimed EEZ.¹⁰² On 9 June 2011, a Chinese fishing vessel backed by two Chinese patrol vessels rammed the survey cable of the *Viking II*, another Vietnamese seismic survey ship, 60 nautical miles off the south coast of Vietnam and more than 500 nautical miles from China's Hainan Island.¹⁰³ Vietnam asserted that the above actions seriously violated Vietnam's sovereign rights over its EEZ and continental shelf, as well as contravening the LOSC and the spirit of the Declaration on the Conduct of Parties in the South China Sea (DOC) signed by China and ASEAN in 2002.¹⁰⁴ Chinese vessels have also harassed Philippine oil survey ships in the Reed Bank area, approximately 60 miles west of Palawan and well within the Philippines claimed EEZ.¹⁰⁵ In May 2014, China placed a large oil rig within the EEZ and on the continental shelf claimed by Vietnam, approximately 130-150 nautical miles off the Vietnamese coast.¹⁰⁶ During this maritime standoff, Vietnam accused China Coast Guard ships of aggressively firing

¹⁰¹ Tran Truong Thuy, 'The South China Sea: Interests, Policies, and Dynamics of Recent Developments' (Paper presented at the Conference for Managing Tensions in the South China Sea, CSIS, 5-6 June 2013), 6.

¹⁰² Ibid 7.

¹⁰³ James Kraska and Raul Pedrozo, *International Maritime Security Law* (Koninklijke Brill NV, 2013), 323.

¹⁰⁴ *Vietnam demands China Stop Sovereignty Violations* (29 May 2011) Thanh Nien News <<http://www.thanhniennews.com/2010/pages/20110530011353.aspx>>.

¹⁰⁵ Bonnie S Glaser, *Armed Clashes in the South China Sea* (April 2012) Council on Foreign Relations Press <<http://www.cfr.org/world/armed-clash-south-china-sea/p27883>>.

¹⁰⁶ *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyou 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam* (7 July 2014) Consulate of the Socialist Republic of Vietnam in New York, The United States of America <<http://vietnamconsulate-ny.org/news/2014/07/position-paper-viet-nam-chinas-illegal-placement-haiyang-shiyou-981-oil-rig-exclusive>>.

high-powered water cannons at, and intentionally ramming, Vietnamese law enforcement ships while Chinese aircraft circled above Vietnamese vessels.¹⁰⁷ The 75 day maritime standoff between China and Vietnam ended on 16 July 2014 when China decided to withdraw the drilling rig from the contested area.¹⁰⁸

As the economies of littoral States rely heavily on the natural resources of the South China Sea, disputes over access to resources will persist unless the countries involved enter into compromise arrangements.

2.3.4 Foreign military activities in the maritime zones of coastal States

Disputes over foreign military activities in the maritime zones of coastal States in the South China Sea mainly involve the United States and China. Indeed, these two States hold contradictory views over foreign military activities in the EEZ and the passage of foreign warships through the territorial sea of coastal States.

Under the LOSC, “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”¹⁰⁹ China, however, applies a restrictive view on the innocent passage regime of the LOSC. While the United States and other maritime user States argue that foreign warships enjoy the right of innocent passage through the territorial sea of coastal States; China, on the other hand, requires prior authorisation for such passage.¹¹⁰ Other littoral States of the South China Sea, particularly Vietnam and Taiwan, require prior notification for the passage of foreign warships through their territorial seas, while the current domestic laws of Indonesia,

¹⁰⁷ *Chinese aircraft intimidate Vietnam's law enforcement vessels* (21 June 2014) Vietnamnet <<http://english.vietnamnet.vn/fms/government/105605/chinese-aircraft-intimidate-vietnam-s-law-enforcement-vessels.html>>; see also *Chinese ships ram Vietnamese vessels in latest oil rig row: officials* (07 May 2014) Thanhniên News <<http://www.thanhniennews.com/politics/chinese-ships-ram-vietnamese-vessels-in-latest-oil-rig-row-officials-26069.html>>.

¹⁰⁸ See Chapter six of this thesis for a detailed discussion of this incident.

¹⁰⁹ LOSC, art 17.

¹¹⁰ See Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (effective 25 February 1992), art 6; see also Chapter 5 of this thesis for further information.

Malaysia, Brunei and the Philippines do not address this issue.¹¹¹ As the LOSC does not contain any specific provision regarding the innocent passage of warships, States continue to interpret the innocent passage regime of the LOSC in different ways and in accordance with their own vested interests.

In addition to the innocent passage regime, the issue of foreign military activities in the EEZ of coastal States represents another controversial issue. As military activities in the EEZ are not clearly defined in the LOSC, China and the United States have adopted very different positions on this topic. For the United States, military surveying, hydrographic surveying, and the collection of intelligence by military vessels and aircraft in a foreign state's EEZ are normal activities that fall within the high seas freedoms of navigation and overflight granted by the LOSC.¹¹² As Pentagon Press Secretary Geoff Morrell has stated: "Coastal States do not have a right under international law to regulate foreign military activities in the EEZ."¹¹³ China, however, argues that military data collection violates the principle of peaceful use of the sea set out in the LOSC.¹¹⁴ In a statement concerning a joint naval exercise between the United States and South Korea in 2010, China's Foreign Ministry spokesman Hong Lei said:

¹¹¹ See Chapter 5 of this thesis for a detailed analysis of this topic.

¹¹² LOSC arts 58(1) and 87. Article 58 of the LOSC states that all States enjoy "the freedoms referred to in article 87 of navigation and overflight...and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft [etc]". Article 87 of the LOSC recognises the high seas freedom of navigation and overflight for all States.

¹¹³ *DoD News Briefing with Geoff Morrell from the Pentagon* (March 11, 2009) U.S. Department of Defense <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4369>>; the United States agrees that coastal States have the right to regulate and authorize marine scientific research in their EEZs. However, it has identified some marine data collection activities that are not marine scientific research. These include prospecting for and exploration of natural resources; hydrographic surveys (for enhancing the safety of navigation); military activities including military surveys; activities related to the laying and operation of submarine cables; environmental monitoring and assessment of marine pollution pursuant to section 4 of Part XII of the Convention; the collection of marine meteorological data and other routine ocean observations, see *Marine Scientific Research Authorizations* (25 November 2015) U.S. Department of State <<http://www.state.gov/e/oes/ocns/opa/rvc/>>.

¹¹⁴ Art 88 of the LOSC states that "the high seas shall be reserved for peaceful purposes", while Art 300 requires States to exercise the rights, jurisdiction and freedoms in a manner which would not constitute an abuse of right; see Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012) 28(74) *Merkourios* 22, 23-28.

“We oppose any party to take any military acts in our exclusive economic zone without permission.”¹¹⁵ Prominent incidents such as a collision between a U.S. reconnaissance aircraft and a Chinese fighter in 2001,¹¹⁶ an incident which occurred in 2009 involving USNS *Impeccable*,¹¹⁷ and a recent incident between a Chinese amphibious dock ship and USS *Cowpens*,¹¹⁸ will be discussed in Chapter Seven of the thesis.

These incidents demonstrate that military activities in the EEZ of foreign States continue to be a controversial issue. Given that most waters in the South China Sea are within EEZs claimed by coastal States, conflicts of interest between coastal States and maritime powers over military activities in the EEZ represent potential flash points and need to be managed carefully.

2.4 The growth of naval powers and maritime law enforcement capabilities

2.4.1 Rise of China’s naval and maritime law enforcement capabilities in the South China Sea

To strengthen their maritime claims and protect their national interests in the South China Sea, all territorial claimants within the region have increased their defence budgets, expanding and upgrading their naval capabilities. However, the power of the Chinese Navy far exceeds the combined naval capability of all the other claimant States in the South China Sea. The rise of China’s naval capabilities coincides with the modernisation of China’s military – a process which started in the 1990s and was

¹¹⁵ Quoted in Ian Johnson and Martin Fackler, *China Addresses Rising Korean Tensions* (November 26, 2010) The New York Times

<http://www.nytimes.com/2010/11/27/world/asia/27korea.html?pagewanted=all.&_r=0>.

¹¹⁶ Shirley A Kan, 'China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications' (Congressional Research Service, October 2001), 20.

¹¹⁷ LOSC, art 58(1); see also Rosenberg, above n 1, 10-11.

¹¹⁸ Carlyle A Thayer, *Cowpens Incident Reveals Strategic Mistrust between U.S and China* (17 December 2013) The Diplomat <<http://thediplomat.com/2013/12/uss-cowpens-incident-reveals-strategic-mistrust-between-u-s-and-china/>>.

spurred by the 1996 Taiwan Strait Crisis.¹¹⁹ These increased naval capabilities have allowed China to fiercely protect its interests in the South China Sea (among other things). For the past decade, and due to its stable economic growth, China's military spending has increased by double-digits. In 2012, China announced a defence budget of \$114 billion. However, according to the U.S. Department of Defense, China's defence spending could well exceed the State's published figures, with a defence budget between \$135 billion and \$215 billion being more likely.¹²⁰ With this defence budget, China is the world's second largest defence spender after the United States. Moreover, China's defence budget has continued to increase in recent years, with *Defence News* reporting a defence budget of \$146 billion in 2016.¹²¹ Apart from its weapons acquisition program, which includes anti-ship ballistic missiles, anti-ship cruise missiles, manned and unmanned aircraft, submarines, as well as surface ships, China's naval modernisation also has led to the improvement of other defence areas, such as C4ISR (command, control, communications, computing, intelligence, surveillance, and reconnaissance), defence maintenance and logistics, military research projects, education and training, and military exercises.¹²²

According to a 2015 report by the U.S. Department of Defense on *Military and Security Developments Involving China*, the Chinese Navy possesses more than 300

¹¹⁹ David Shambaugh, *Modernizing China's Military: Progress, Problems and Prospects* (University of California Press, 2002), 4; see also Adam Ward, 'China's military modernization: A confluence of improvements' (2003) 9(6) *IJSS Strategic Comments* 1, 1-2.

¹²⁰ Marcus Weisgerber, *Annual DoD Report Claims Steady Chinese Military Expansion* (6 May 2013) Defense News <<http://www.defensenews.com/article/20130506/DEFREG02/305060008/>>.

¹²¹ *China Raises 2016 Defense Spending by 7.6%* (6 March 2016) <<http://www.defensenews.com/story/defense/2016/03/06/china-raises-defense-spending/81407252/>>.

¹²² Ronald O'Rourke, 'China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress' (Congress Research Service, September 2013), 3; Richard Bitzinger, 'Modernising China's Military, 1997-2012' (2011) 4 *China Perspectives* 7, 13.

vessels including surface ships, submarines, amphibious ships, and patrol vessels.¹²³ The U.S. Department of Defense also revealed that China is fielding a medium-range anti-ship ballistic missile, known as the DF-21D, which is capable of attacking aircraft carriers and other naval ships operating in the Western Pacific.¹²⁴ Chinese naval aviation has also been equipped with modern aircraft such as the Su-30MK2 fighter, JH-7A fighter-bombers and the Y-8J airborne early warning aircraft.¹²⁵ In 2015, China signed a contract with Russia for the construction of 24 Su-35 fighters which are scheduled for completion within the next three years.¹²⁶ China has also expanded its submarine fleet with both modern indigenous-built and foreign-built submarines. China's navy has acquired various diesel-electric submarines, including 13 Type-039 Song-class, 13 Type-039A Yuan-class, and 12 Kilo-class, as well as different classes of nuclear submarines, including five Han-class, four Type-094 Jin-class, and six Type-093 Shang-class.¹²⁷ Currently, the Chinese navy possesses 21 Destroyers, including six Luyang II-class (Type-052C), and three Luyang III-class guided missile destroyers (Type 052D), which are capable of launching multipurpose missiles.¹²⁸ Most notably, in 2012 the Chinese navy commissioned into service a refurbished aircraft carrier purchased from Ukraine in 1998. Although China requires more time to operate this aircraft carrier effectively, the entry into service of this carrier has helped China strengthen its image as a significant maritime power. Table 2.2 shows the number of

¹²³ 'Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2015' (U.S. Department of Defence, 2015), 8.

¹²⁴ O'Rourke, above n 122, 10.

¹²⁵ Felix K. Chang, 'China's Naval Rise and the South China Sea: An Operational Assessment' (2012) (Winter) *Orbis* 19, 23.

¹²⁶ Dave Majumdar, *China to Get Russia's Lethal Su-35 Fighter This Year* (20 January 2016) <<http://nationalinterest.org/blog/the-buzz/china-get-russias-lethal-su-35-fighter-year-14968>>.

¹²⁷ Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2015, above n 123, 9.

¹²⁸ Ibid; see also Chris Rahman, 'People's Liberation Army Navy (PLAN)' in Conrad Waters (ed), *Navies in the 21st Century* (Seaforth, 2016) 97-98

Chinese navy ships from 2005 to 2015 based on the U.S. Congress Research Service. The table does not indicate a large increase in total numbers of ships; however, many old ships have been replaced with newer and far more combat capable vessels.¹²⁹

Table 2.2 Number of Chinese Navy ships from 2005 to 2015

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Nuclear-powered attack submarine	6	5	5	5	6	6	5	5	5	5	5
Diesel attack submarines	51	50	53	54	54	54	49	49	49	51	53
Aircraft carriers	0	0	0	0	0	0	0	1	1	1	1
Destroyers	21	25	25	29	27	25	26	26	23	24	21
Frigates	43	45	47	45	48	49	53	53	52	49	52
Corvettes	0	0	0	0	0	0	0	0	0	8	15
Missile-armed coastal patrol craft	51	45	41	45	70	85	86	86	85	85	86
Amphibious ships: LSTs and LPDs	20	25	25	26	27	27	27	28	29	29	29
Amphibious ships: LSMs	23	25	25	28	28	28	28	23	26	28	28

Source: extracted by the author from Ronald O'Rourke, 'China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress', Congress Research Service, September, 2015

The South Sea Fleet, based in Zhanjiang, Guangdong, is now the most capable of China's three fleets. Indeed, over the past few decades, most of China's modern ships have been allocated to the South Sea Fleet, amid rising tensions in the South China Sea. These include four Luyang-class destroyers fitted with vertical launch surface to air missiles with a 100 km range, two Jiangkai-II class frigates equipped with surface to air missiles capable of cold launch, as well as different classes of new attack submarines,

¹²⁹ Ibid 11.

among them four Kilo-class, two Shang-class, three Song-class, and one Yuan-class.¹³⁰ The South Sea Fleet has also received 24 Su-30MK2 fighters, together with a regiment of JH-7A fighter bombers based on Hainan Island. As a result, China's air power in the South China Sea has improved.¹³¹ With its increasing expansion of naval bases on Hainan Island, the construction of an airfield on Woody Island in the Paracel Islands, the deployment of surface-to-air missiles to Woody Island, and many hardened and concrete hangars capable of housing fighter and strategic bombers, as well as air-refuelling aircraft, which have been built on various artificial islands built by China in the Spratly Islands, China's navy has strengthened its capability to pursue effective control of the entire South China Sea region.¹³²

Apart from naval modernisation, China's law enforcement capabilities have also been strengthened. For many years, China maintained five maritime law enforcement agencies, including the China Coast Guard under the Ministry of Public Security, the Maritime Safety Administration under the Ministry of Transport, China Marine Surveillance under the State Oceanic Administration, the Fisheries Law Enforcement Command under the Ministry of Agriculture, and the State and General Administration of Customs.¹³³ These five law enforcement agencies, which were often referred to as the "Five Dragons", employed almost 40,000 people and boasted a fleet of roughly 480 vessels, including 8 large cutters, 19 midsize cutters, 149 small cutters, and 304 small

¹³⁰ Felix K. Chang, 'China's Naval Rise and the South China Sea: An Operational Assessment' (2012) 56(1) *Orbis* 19, 23-30.

¹³¹ Ibid.

¹³² Carlyle A. Thayer, 'The United States and Chinese Assertiveness in the South China Sea' (2010) 6(2) *Security Challenges* 69, 73; L. Todd Wood, *China builds hardened aircraft shelters in South China Sea* (9 August 2016) Washington Times <<http://www.washingtontimes.com/news/2016/aug/9/china-builds-hardened-aircraft-shelters-in-south-c/>>.

¹³³ Gong Jianhua, *Need for unified coast guard* (19 October 2012) China Daily <http://europe.chinadaily.com.cn/opinion/2012-10/19/content_15829822.htm>.

boats.¹³⁴ Of these vessels, more than 130 were allocated to patrolling the South China Sea, including 4 large cutters, 5 midsize cutters, 48 small cutters and 80 small boats.¹³⁵

As these five agencies were under different commands and had overlapping responsibilities, their performance was often criticised as being decentralised and ineffective. Thus, in order to strengthen its maritime law enforcement capacities, China established a unified coast guard in July 2013 – one which integrates the functions of the existing coast guard, chiefly marine surveillance, fisheries law enforcement and anti-smuggling.¹³⁶ The new Coast Guard, which is administered under China's State Oceanic Administration, part of the Ministry of Land and Resources, possesses 11 squadrons and more than 16,000 personnel, but retains the core mission of maintaining China's national maritime rights and interests, including enforcing the State's sovereign territorial claims.¹³⁷

With its increasing number of naval ships and maritime law enforcement vessels in the South China Sea, China will undoubtedly become more assertive over resources and its maritime territorial claims in the future.

2.4.2 Responses from other littoral states

In response to China's rise as a maritime power, other littoral states in the South China Sea have modernised their navies and strengthened their maritime law enforcement capabilities.

According to the geographical limits of the South China Sea set out in this thesis, Singapore is not a South China Sea littoral State. Nor has Singapore made a

¹³⁴ Lyle J. Goldstein, *Five Dragons Stirring Up the Sea: Challenge and Opportunity in China's Improving Maritime Enforcement Capabilities* (China Maritime Studies Institute, US Naval War College, 2010), 4-6.

¹³⁵ Ibid.

¹³⁶ Jianhua, above n 133.

¹³⁷ *New China Coast Guard expected to do more patrolling* (24 July 2013) Taipei Times <<http://www.taipeitimes.com/News/front/archives/2013/07/24/2003568020>>.

claim to any territory or features in the region. However, as an island country that is heavily reliant on secure access to SLOCs, Singapore's national security interests in the South China Sea are mainly SLOC protection, seaward defence, and international security.¹³⁸ Singapore's navy has undergone rapid development and modernisation over the past decade. Indeed, the State currently has six Formidable-class guided missile frigates with blue water combat capability, four Challenger-class conventional submarines, two Archer-class diesel-electric submarines equipped with air-independent propulsion, and four Endurance-class landing platform docks, each capable of carrying 350 troops, 18 tanks, four helicopters and four landing craft.¹³⁹ Singapore's air force has 74 F-16s and 24 F-15SG fighters, nine air-to-air refuelling tanker aircraft, four Gulfstream G550s airborne early warning aircraft, and 20 AH-64D Apache Longbow attack helicopters. In the near future, a number of F-35 Joint Strike Fighters may be joining the fleet.¹⁴⁰ With support from the State's air force, the Singapore navy is becoming a regional leader in terms of naval modernisation and three-dimensional combat capabilities.

Malaysia has also enhanced its naval capabilities, acquiring two Lekiu-class frigates in 1999, two Scorpene-class submarines in 2009, and six MEKO A100 offshore patrol vessels.¹⁴¹ Malaysia's air force has also been expanded, with the addition of 18 Su-30MKM, eight F/A-18Ds, and 13 F-5E/Fs. Moreover, there are plans to acquire another 18 fighter aircraft and four airborne early warning aircraft over the next few

¹³⁸ Swee Lean Collin Koh, 'Seeking Balance: Force Projection, Confidence Building, and the Republic of Singapore Navy' (2012) 65(1) *Naval War College Review* 75, 78.

¹³⁹ Richard A. Bitzinger, 'A New Arms Race? Explaining Recent Southeast Asian Military Acquisitions' (2010) 32(1) *Contemporary Southeast Asia* 50, 57; Koh, above n 138, 82-83.

¹⁴⁰ Bitzinger, above n 139, 57.

¹⁴¹ Bitzinger, above n 139, 54.

years.¹⁴² Malaysia established its coast guard in 2005 as the Maritime Enforcement Agency (MMEA). The coast guard currently possesses two amphibious aircraft, 50 ships, and 76 fast boats ranging from 50 tons to 2000 tons.¹⁴³ In 2015, Malaysia announced that it was allocating RM\$31.2 billion to be spent across the Malaysian Armed Forces, the Royal Malaysian Police and the Malaysian Maritime Enforcement Agency.¹⁴⁴

The Indonesian navy currently possesses two Type-209 submarines, four new Sigma-class corvettes and four Makassar-class landing platform docks. The State also plans to buy three Type-209 Chang Bogo submarines from South Korea to replace its existing Type-209s.¹⁴⁵ The Indonesian air force has acquired ten Sukhois and plans to buy up to 40 of them over the next few years. In 2010, Indonesia negotiated an agreement with the United States for the supply of 24 F-16C/D combat aircraft.¹⁴⁶ The Indonesian navy announced its plans for a 'Green-Water Navy' in 2005, setting a goal of achieving a 274-ship force structure by 2024. This Green Water Navy will be composed of 110 strike ships, 66 patrolling ships, and 98 supporting ships.¹⁴⁷ Indonesia's defence budget has increased by 0.8 per cent annually over the last ten years, from US\$2.4 billion in 2004 to US\$8.3 billion in 2013.¹⁴⁸ Currently, Indonesia's

¹⁴² Ibid.

¹⁴³ Mohamad Rosni Othman, 'A New Management Structure for Malaysian Economic Exclusive Zone' (2012) 4(1) *The International Journal of Social Science* 47, 53.

¹⁴⁴ *RM31.2 billion to strengthen national security forces* (24 October 2015) Malaysian Insider <<http://www.themalaysianoutsider.com/malaysia/article/rm31.2-billion-to-strengthen-national-security-forces>>.

¹⁴⁵ Bitzinger, above n 139, 53.

¹⁴⁶ 'Chapter Six: Asia' (2013) 113(1) *Military Balance* 245, 264; 'Chapter Six: Asia' (2016) 166 (1) 211, 211-306.

¹⁴⁷ Ristian Atriandi Supriyanto, *Naval modernisation: A sea change for Indonesia?* (30 January 2012) The Nation <<http://www.nationmultimedia.com/opinion/Naval-modernisation-A-sea-change-for-Indonesia-30174719.html>>.

¹⁴⁸ 'Chapter Six: Asia', above n 146, 265.

maritime law enforcement capabilities are considered weak and insufficient.¹⁴⁹ Indeed, according to Law No. 17/2008 on shipping, Indonesia should have an independent sea and coast guard. However, for many years the responsibility for maritime security and law enforcement in Indonesian waters has fallen to different ministries and institutions.¹⁵⁰ In December 2014, Indonesian President Joko Widodo declared that an Indonesian Maritime Security Agency would be established to act as a coast guard for Indonesia.¹⁵¹ In 2015, the Indonesian government announced that it would increase military spending from 0.8 per cent to 1.5 per cent of GDP, bringing the State's total military expenditure to \$15 billion by 2020.¹⁵²

Vietnam has enhanced its naval and maritime capabilities, especially over the past five years. The State's defence budget has steadily increased from US\$2.67 billion in 2011 to US\$3.33 billion in 2012, reaching US\$5.73 billion in 2014.¹⁵³ The Vietnamese navy has received two Gepard-class guided missile frigates from Russia, and is anticipating the arrival of another two in a few years. Between 2010 and 2012, 20 Su-30MK2V combat aircraft armed with anti-ship cruise missiles, and two batteries of the K-300P Bastion coastal defence missile system, were delivered by Russia.¹⁵⁴ In 2008, Vietnam ordered six Kilo-class submarines from Russia, with the first one having been delivered to the Vietnamese navy in January 2014. To date, the Vietnamese navy has four Kilo-class submarines as part of its fleet. In 2009, Vietnam established its naval air arm directly under Vietnamese naval command, with a number of aircraft transferred

¹⁴⁹ See, for example, Dirhamsyah, 'Maritime Law Enforcement and Compliance in Indonesia: Problems and Recommendations' (2005) 144 *Maritime studies* 1, 4.

¹⁵⁰ Ibid.

¹⁵¹ Clarissa Tanurahardja, *Jokowi's Maritime Policy : Indonesia, A Global Axis* (25 March 2015) Australia Indonesia Youth Association <<http://www.aiya.org.au/2015/03/jokowis-maritime-policy-indonesia-a-global-axis/>>.

¹⁵² Zachary Abuza, *Analyzing Southeast Asia's Military Expenditures* (7 May 2015) Center for Strategic & International Studies <<http://cogitasia.com/analyzing-southeast-asias-military-expenditures/>>.

¹⁵³ 'Chapter Six: Asia', above n 146, 277; Abuza, above n 152.

¹⁵⁴ 'Chapter Six: Asia', above n 146, 227.

from the air force and additional maritime surveillance aircraft acquired from various foreign countries. Vietnam has also engaged in on-going talks with the United States and European countries for the purchase of combat and maritime patrol aircraft.¹⁵⁵ Closer to home, Vietnam plans to buy the BrahMos supersonic anti-ship missile from India, which is capable of being fired from ships and aircraft.¹⁵⁶ The combined effect of these new and incoming assets is that Vietnam has increased its self-reliance in terms of defence capabilities. The Vietnamese Marine Police Force, which was established in 1998, was restructured in 2013 to form the Vietnamese Coast Guard, with the objective of improving capabilities as well as expanding cooperation with regional counterparts. With a number of offshore patrol vessels capable of carrying helicopters and three new C212-400 maritime patrol aircraft, the Vietnamese Coast Guard has enhanced its maritime law enforcement capabilities in the South China Sea. In April 2014, Vietnam officially established its Fisheries Surveillance Force (VFSF) under the Ministry of Agriculture and Rural Development. The construction of 32 patrol vessels and four large fisheries surveillance vessels capable of carrying helicopters was also approved by the Vietnamese Government in 2014.¹⁵⁷ Vietnam's total expenditure on new coast guard vessels and associated equipment in 2014 was US\$540 million.¹⁵⁸ The government also allocated a further \$US200 million to build four more large fisheries surveillance

¹⁵⁵ 'Chapter Six: Asia' in *The Military Balance 2016* (The International Institute for Strategic Studies, 2016) vol 116, 212.

¹⁵⁶ Rahul Bedi, *India aims to supply BrahMos cruise missiles to Vietnam* IHS Jane's Defence Weekly <<http://www.janes.com/article/60876/india-aims-to-supply-brahmos-cruise-missiles-to-vietnam>>.

¹⁵⁷ Murray Hiebert and Phuong Nguyen, *Vietnam Ramps Up Defense Spending, but Its Challenges Remain* (18 March 2013) ASIA Maritime Transparency Initiative <<http://amti.csis.org/vietnam-ramps-up-defense-spending-but-its-challenges-remain/>>.

¹⁵⁸ See Thanh Vu and Huu Tra, *Vietnam to spend \$750 mil upgrading Coast Guard and fishing fleet* (4 July 2014) Thanh Nien News <<http://www.thanhniennews.com/politics/vietnam-to-spend-750-mil-upgrading-coast-guard-and-fishing-fleet-28051.html>>.

vessels to work alongside the coast guard and counter China's increasing aggression in the South China Sea.¹⁵⁹

Unlike Vietnam, the naval capability of the Philippines is very limited. Indeed, the State's main surface combatants include three Jacino-class corvettes and one Rajah Humabon destroyer escort without any cruise missiles.¹⁶⁰ Recently, the Philippine navy acquired two renovated Hamilton-class cutters and 12 FA-50 light attack planes from South Korea. In July 2012, Philippine President Benigno Aquino announced that his government would allocate US\$2.3 billion over five years to modernise the State's Armed Forces.¹⁶¹ With this level of defence spending, it is quite likely that the Philippine navy will acquire further major surface combatants in the coming years. The Philippine Coast Guard fleet has greatly expanded over the last five years, and there are plans for the service to acquire ten multi-role response vessels, one offshore patrol vessel, 24 fast patrol boats, and seven Bell helicopters in the near future.¹⁶²

The Brunei navy is the smallest navy among the littoral states in the region. With only 1000 personnel, four landing craft and 11 patrol and coastal combatants, its ability to resist an outside aggressor is very limited.¹⁶³

China's naval modernisation has had a great impact on Taiwan. Taiwan is a South China Sea claimant but since the majority of States recognise the "one China" policy, developing a naval force with asymmetric capabilities which can successfully defend the island from a seaward invasion has been difficult to achieve, despite the fact

¹⁵⁹ Carlyle A Thayer, 'Vietnam's Maritime forces' (Paper presented at the Conference on Recent Trends in the South China Sea and U.S. Policy, Center for Strategic and International Studies, Washington D.C., 2014), 14.

¹⁶⁰ Chang, above n 130, 35.

¹⁶¹ 'Chapter Six: Asia', above n 146, 50.

¹⁶² *Philippine Coast Guard chief reveals future requirements: OPVs, helicopters, fast patrol boats* (18 September 2013) Defence IQ <<http://www.defenceiq.com/naval-and-maritime-defence/articles/philippine-coast-guard-chief-reveals-future-requir/>>.

¹⁶³ 'Chapter Six: Asia', above n 146, 284.

that this is critical to Taiwanese national security. Taiwan has increased its defence budget from US\$9.6 billion in 2009 to US\$10.3 billion in 2015.¹⁶⁴ A total of 31 fast attack boats equipped with anti-ship missiles have been provided to the Navy since 2010. In addition, several Jinn Chiang-class patrol boats have been upgraded with super-sonic anti-ship missiles since 2011, and a new domestic submarine program is being considered for the Taiwanese navy.¹⁶⁵ Taiwan has upgraded its E-2K Hawkeye early warning aircraft, acquired P-3C Orion maritime patrol aircraft, and hopes to buy several F-16s from the United States.¹⁶⁶ The Taiwan Coast Guard (CCG) has also been expanded in terms of assets and capabilities. In 2004, it requested US\$2.4 billion for the acquisition of fixed-wing aircraft and large ships capable of carrying helicopters for the next 15 years.¹⁶⁷ In 2013, one 2,000-ton cutter and one 1,000-ton patrol boat were delivered to the CCG as part of a 37 ship building program.¹⁶⁸

2.4.3 Potential maritime incidents in the South China Sea

As previously discussed, there are many different types of surface vessels, aircraft and submarines operating in the South China Sea. Moreover, with States increasing their defence budgets, it is highly likely that additional vessels and aircraft will be added to existing fleets in the coming years. The Air Force and Naval Aviation commands in China's Guangzhou Military Region operate an impressive 322 aircraft of different types. Indeed, by comparison, the number of aircraft operated by other States in the region is meagre. Vietnam operates 101 aircraft, Malaysia operates 61 aircraft,

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 274-275.

¹⁶⁶ Ibid.

¹⁶⁷ Rachel Chan, *New vessels boost ROC coast guard capabilities* (01 April 2013) Taiwan Today <<http://taiwantoday.tw/ct.asp?xItem=203474&CtNode=1963>>.

¹⁶⁸ Ibid.

while the Philippines operates just 12 new FA-50 light attack planes.¹⁶⁹ The South Sea Fleet of China's navy and the navies of all other littoral states surrounding the South China Sea currently comprise 38 submarines, 83 principal surface combatants and 381 patrol and coastal combatants. Meanwhile, the law enforcement agencies of these States have roughly 1134 patrol vessels between them.¹⁷⁰ The sheer number of State vessels operating in the South China Sea, together with various types of commercial vessels and the 1.77 million fishing vessels competing for space, make this maritime region crowded and vulnerable to maritime incidents. With multiple sovereign immune vessels including submarines, commercial vessels and fishing vessels operating in these confined and disputed waters, maritime incidents will be difficult to avoid altogether. Indeed, there have been a number of incidents in the South China Sea between various types of vessels, including: (i) military vessels and fishing vessels; (ii) military vessels and law enforcement vessels; (iii) law enforcement vessels and fishing vessels; and (iv) submarines and surface vessels.¹⁷¹ These incidents will be detailed in Chapter Seven. Since 2013, China has built artificial islands and airstrips capable of accommodating military aircraft on a number of disputed features in the Spratly Islands. In 2016, China deployed surface-to-air missiles to Woody Island in the Paracels.¹⁷² In the near future, it is expected that China could declare an Air Defence Identification Zone in the South

¹⁶⁹ Henrik Paulsson, *Air power in the South China Sea: Vietnam, Malaysia and the Philippines* (12 April 2016) Interpreter <<http://www.lowyinterpreter.org/post/2016/04/12/Air-power-in-the-South-China-Sea-Vietnam-Malaysia-and-the-Philippines.aspx>>.

¹⁷⁰ 'Chapter Six: Asia', above n 146. Numbers of ships were adapted by the author from data provided in this chapter.

¹⁷¹ Sam Bateman, 'Perils of the Deep: The Dangers of Submarine Proliferation in the Seas of East Asia' (2011) 7(1) *Asian Security* 61, 75-77; Ian Storey, 'The Sino-Vietnamese Oil Rig Crisis: Implications for the South China Sea Dispute' (2014) 52 *ISEAS Perspective* 1; Barbara Starr, *Sub collides with sonar array towed by U.S. Navy ship* (12 June 2009) CNN <<http://edition.cnn.com/2009/US/06/12/china.submarine/>>; see also David Alexander, *Chinese inexperience a factor in warships' near-miss: U.S. admiral* (16 Jan 2014) Reuters <<http://www.reuters.com/article/2014/01/16/us-usa-china-warships-idUSBREA0F02220140116>>.

¹⁷² Katie Hunt, Jim Sciutto and Tim Hume, *China said to deploy missiles on South China Sea island* (18 February 2016) CNN <<http://edition.cnn.com/2016/02/16/asia/china-missiles-south-china-sea/>>.

China Sea.¹⁷³ If this transpires, then it is likely that China will intensify its air patrol in the region. As a result, incidents involving military and law enforcement aircraft over the South China Sea will be a critical concern.

2.5 Conclusion

The South China Sea is not only a critical waterway for merchant shipping and military transits and operations, but also contains rich fishing grounds and potential oil and gas reserves. However, maritime disputes in this region are quite common and highly complex. These disputes concern offshore sovereignty and maritime boundaries claims; access to resources; military navigation and activities in different maritime zones of coastal States, particularly the innocent passage of warships in the territorial sea, as well as military surveying, hydrographic surveying and intelligence collection in the EEZ. As the security concerns of coastal States in the South China Sea are escalating, concerned States have responded by increasing and modernizing their maritime forces. Indeed, increased naval and law enforcement surface vessels, submarines, and aircraft are being added to the region each year. Unfortunately, this means that the potential for maritime incidents between military and government vessels and aircraft of interested States is also likely to increase. For this reason, defining the international legal basis and geopolitical challenges associated with navigating the shoals of the South China Sea for sovereign immune vessels and aircraft is not only critical for individual States, but also for the security of the region as a whole.

¹⁷³ *Beijing says it could declare ADIZ over South China Sea* (13 July 2016) Japan Times
<<http://www.japantimes.co.jp/news/2016/07/13/asia-pacific/china-blames-philippines-stirring-trouble-inherent-territory/#.WF4cC027q74>>

3 STRATEGIC CONTEXT OF THE SOUTH CHINA SEA

3.1 Introduction

As discussed in Chapter Two of this thesis, the geopolitical interests in the South China Sea make the region significant to littoral States and external powers. However, the States concerned have different capacities and strategies to pursue their interests in the region. While access to resources and maintaining peace and security are key priorities for littoral States, external players are chiefly concerned with the freedom of navigation and overflight, as well as the safe and secure passage of shipping which rule-based orders tend to promote. For China, resource security is a key strategic interest, but so too is the projection of power and the extension of its sphere of influence. The South China Sea policy of the United States centres on honouring commitments to regional allies and cooperating with China for its national interests. However, for smaller South China Sea claimant States, protecting territorial sovereignty and associated maritime claims in the region while avoiding military conflict with China are prime considerations. In light of the varying interests of the States concerned, the South China Sea is of high strategic significance, shaping relationships between States in the region and their interaction with extra-regional players. Moreover, on 12 July 2016, an arbitral tribunal established under Annex VII of the Law of the Sea Convention (LOSC) delivered a ruling in the China-Philippines South China Sea dispute. As briefly discussed in Chapter Two, this ruling has several strategic implications for the region, and as a result certain States may need adjust their national policies accordingly.

This chapter provides the strategic context of the South China Sea. With this objective, the interests and strategies of littoral States and external players in the South China Sea will be explored, as well as the strategic implications of the arbitral tribunal's award in the regional dispute between China and the Philippines.

3.2 Interests and strategies of South China Sea littoral States

3.2.1 China's interests and strategies in the South China Sea

3.2.1.1 China's interests in the South China Sea

As the largest country in the world in terms of population, and the world's largest energy consumer, resource security is a major challenge for the Chinese government. Therefore, it is rather unsurprising that China has asserted its military might to ensure maximum access to living and non-living resources in the South China Sea. Besides access to food supplies to sustain its massive population, access to oil and gas resources in the South China Sea may help China reduce its dependence on energy supplies from Africa and the Persian Gulf - resources which must travel through the Strait of Malacca. This has been described as the "Malacca Dilemma" by Chinese strategists.¹ China claims almost all the waters of the South China Sea based on its nationalistic view of "historic rights", and has utilised both law enforcement and military personnel to assert its claims. The concept of historic rights is not clearly defined in international law, and the LOSC "does not recognize historic rights as a basis for claiming sovereignty over waters."² However, China has been willing to use its maritime forces to oppose any action which violates its claimed sovereignty or historic rights in the South China Sea.

China is heavily dependent on imported energy, with nearly 80 per cent of the State's imported crude oil passing through the South China Sea.³ For this reason, protecting sea lines of communication (SLOC) in the South China Sea is crucial for

¹ Michael McDevitt, 'The South China Sea and U.S. Policy Options' (2013) 35(4) (August) *American Foreign Policy Interests* 175, 181.

² Florian Dupuy and Pierre Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 138.

³ Robert D Kaplan, *Why the South China Sea is so crucial* (20 February 2015) Business Insider <<http://www.businessinsider.com.au/why-the-south-china-sea-is-so-crucial-2015-2>>.

China. If the region were to become blocked by an adversary due to a conflict, this would have a significant negative impact on China's economy. Moreover, by controlling the South China Sea, China would have the upper hand if it became embroiled in a conflict with Taiwan or Japan, as approximately 60 per cent of these States' energy supplies also pass through this region.⁴

As China is in the process of building a global maritime power, naval training and exercises are of critical importance. However, even in peacetime and with strong, well-trained U.S. naval forces stationed in Japan and South Korea, the East China Sea is not conducive to China's navy conducting any type of covert training. Indeed, this makes the South China Sea an ideal maritime area for Chinese aircraft carriers and submarines to conduct training and exercises. Moreover, throughout China's modern history, most of its military threats have come from the sea. The *Science of Military Strategy* published by the Chinese Academy of Military Science in 2013 states that "the threat of war in the east is more serious than the threat of war in the west, the threat of war from the sea exceeds that of the threat of war from the land."⁵ As a result, China considers the South China Sea a security "buffer zone" which can protect its mainland from outside attacks.

Furthermore, as a rising power seeking to extend its sphere of influence throughout the region, China has sought to push the United States away from the South China Sea. This strategy is designed to give China a free hand in shaping regional circumstances and dispositions. Indeed, an important part of the "China Dream" is for China to become a global maritime power⁶. However, in order to achieve this status,

⁴ Ibid.

⁵ Quoted in Michael McDevitt, *Becoming a Great "Maritime Power": A Chinese Dream* (Center for Naval Analyses, 2016), 16.

⁶ Ibid 4.

China must first be a well-recognised *regional* maritime power. It is for this reason that China so fiercely protects its maritime interests in the East and South China Seas. If one compares the two seas, it is clear that establishing a stronghold in the South China Sea, which is surrounded by small littoral States, is easier for China than achieving dominance in the East China Sea. Thus, the South China Sea is a more favourable area for China to gain increased status on its way towards becoming a global maritime power.⁷

To further this goal, China has modernised its navy and expanded its naval bases in the region. The expansion of the Yulin naval base on Hainan Island has allowed it to house more submarines and surface vessels. Such expansion accomplishes three main goals: it strengthens China's nuclear deterrent, enhances its counter intervention strategy towards other maritime powers, and supports its law enforcement personnel and military forces in the South China Sea.⁸

3.2.1.2 Chinese strategies in the South China Sea

With the goal of controlling the South China Sea when circumstances permit, China has applied a variety of approaches and strategies to protect its interests in the region.

Firstly, China has tried to integrate with the region to strengthen its regional influence. Cooperating with regional States in both economic and political aspects is a

⁷ A comparative Analysis of the South and East China Seas, see Andy Yee, 'Maritime Territorial Disputes in East Asia: A comparative Analysis of the South China Sea and the East China Sea' (2011) 2 *Journal of Current Chinese Affairs* 165, 165-193.

⁸ The Yulin Naval Base, which is already capable of housing surface combatants and nuclear ballistic missile submarines, will better support Chinese naval operations in the South China Sea. See Carlyle A. Thayer, 'The United States and Chinese Assertiveness in the South China Sea' (2010) 6(2) *Security Challenges* 69, 73-74.

vital strategy for China's "Peaceful Rise."⁹ China has increased its economic relations with the Association of Southeast Asian Nations (ASEAN) through trade and foreign investment. Indeed, China became ASEAN's largest trading partner in 2009, with the two-way trade reaching approximately USD\$400 billion in 2014. Moreover, this figure is expected to reach USD\$1 trillion by 2020.¹⁰ The ASEAN-China Free Trade Agreement (CAFTA), which came into effect on 1 January 2010, covers the largest free trade area in the world in terms of population (two billion people), and is the third largest in terms of nominal GDP, just after the European Economic Area and the North American Free Trade Area.¹¹ China has also launched the Asian Infrastructure Investment Bank (AIIB), which all ASEAN States have joined, as well as advancing the Regional Comprehensive Economic Partnership (RCEP), which also includes all members of ASEAN, as well as Japan, South Korea, India, Australia and New Zealand. Due to the importance of economic relations between ASEAN and China, it is unlikely that ASEAN States will take any action against China which would adversely affect their economies.¹² China became a full dialogue partner with ASEAN in 1996, and has attempted to portray itself as the ultimate benefactor, thereby enhancing its influence in the region.¹³ However, China's behaviour in the South China Sea in recent years has deeply concerned many ASEAN States. China has also utilised ASEAN-driven forums

⁹ See *Full Text: China's Peaceful Development* (6 September 2011) Xinhuanet <http://news.xinhuanet.com/english2010/china/2011-09/06/c_131102329_2.htm>; see also Bonnie S Glaser, *Armed Clashes in the South China Sea* (April 2012) Council on Foreign Relations Press <<http://www.cfr.org/world/armed-clash-south-china-sea/p27883>>.

¹⁰ *ASEAN, China Reaffirm Commitment to Strategic Partnership* (8 June 2015) Permanent Mission of the Republic of Singapore to ASEAN <http://www.mfa.gov.sg/content/mfa/overseasmission/asean/latest_news_in_asean/2015/201506/Latest_News_In_ASEAN_2015-06-08.html>.

¹¹ Xinhua, *Backgrounder: ASEAN-China Free Trade Area* (10 August 2013) China Daily <http://www.chinadaily.com.cn/china/2013livisitsouthasia/2013-10/08/content_17015528.htm>.

¹² Vibhanshu Shekhar, 'ASEAN's Response to the Rise of China: Deploying a Hedging Strategy' (2012) 48(3) *China Report* 253, 256; see also Ian Storey, *Asean Is a House Divided* (15 Jun 2012) Wall Street Journal Asia <<http://search.proquest.com.ezproxy.uow.edu.au/docview/1020400783>>.

¹³ Vibhanshu Shekhar, above n 12.

to consolidate its position and minimise ASEAN's collective power – a power which has the capacity to work against China's interests in the future, especially in the case of the South China Sea.¹⁴ China has always insisted that maritime territorial disputes and sovereignty claims in the South China Sea be resolved through bilateral approaches, rejecting multilateral approaches or any efforts to internationalise the issues. However, as the majority of disputes in the South China Sea involve more than two States, bilateral approaches are unlikely to be effective. By employing this delaying tactic, China gains more time to consolidate its claims and strengthen its control over disputed maritime areas in the region.¹⁵ China has certainly succeeded in dividing ASEAN members and weakening the consolidation of ASEAN.¹⁶ One such example was the failure of ASEAN to issue a joint statement on South China Sea issues at the Foreign Ministers Meeting in Phnom Penh, Cambodia, in 2012, which was perceived by some commentators as a Chinese proxy.¹⁷ A similar situation occurred in 2016, when ASEAN retracted its agreed press statement over rising tensions in the South China Sea only a few hours after it was released to the public. It was later suggested that China had pressured Laos, the ASEAN chair in 2016, to withdraw the statement.¹⁸ It is important to note that at the 49th ASEAN Foreign Ministers Meeting held in 2016 in Vientiane,

¹⁴ Ibid 256-58.

¹⁵ M Taylor Fravel, 'China's Strategy in the South China Sea' (2011) 33(3) *Contemporary Southeast Asia* 292, 297.

¹⁶ Ernest Z Bower, *China Reveals Its Hand on ASEAN in Phnom Penh* (20 July 2012) Center for Strategic and International Studies <<http://csis.org/publication/china-reveals-its-hand-asean-phnom-penh>>.

¹⁷ Carlyle A. Thayer, 'ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?' (2012) 10(34) *Asia-Pacific Journal* 1-22; Thayer also has commented that Cambodia is "showing itself as China's stalking horse", cited in *South China Sea sovereignty dispute overshadows ASEAN talks* (13 July 2012) France 24 <<http://www.france24.com/en/20120713-asean-diplomacy-dispute-row-south-china-sea-china-philippines-vietnam-malaysia-brunei>>. Meanwhile, The Economist has referred to Cambodia as China's "de facto proxy within ASEAN"; see also John D Ciorciari, 'China and Cambodia: Patron and Client?' (2013) 121 (14 June) *International Policy Center Working Paper* 4-5.

¹⁸ See Carlyle A Thayer, *Revealed: The Truth Behind ASEAN's Retracted Kunming Statement* (19 June 2016) Diplomat <<http://thediplomat.com/2016/06/revealed-the-truth-behind-aseans-retracted-kunming-statement/>>.

Laos, ASEAN failed to reach a unified position on the South China Sea disputes, and made no specific mention of the recent ruling of the arbitral tribunal on these disputes. Cambodia was again alleged to have blocked any mention of the arbitral tribunal's ruling against China.¹⁹ It is clear that China has been successful in using its economic and military power to impose diplomatic pressure and even tacitly threaten States to further its own national interests and divide ASEAN member States when it comes to South China Sea issues.

Secondly, China exploits loopholes in international law to justify its actions in the South China Sea. On the one hand, China claims almost all the South China Sea based on what it calls "historical rights", and is willing to use hard power to enforce its claims in complete disregard of international law norms. As Isaac B Kardon has commented, for China, "*history* is a superior consideration to law and can be deployed, loosely, to justify any claims and behaviours that appear to be *prima facie* illegal."²⁰ On the other hand, China interprets international law provisions in ways which suit its own national interests. For many years, smaller littoral States have explored and exploited natural resources within their maritime zones in the South China Sea without dispute or disruption.²¹ However, by claiming almost all the waters of the South China Sea without legal entitlement, and using its power to strengthen its maritime claims, China has changed the status quo in the region, including increasing its maritime patrols. China has also enacted domestic laws and regulations to support the operations of its law

¹⁹ Manuel Mogato and Michael Martina, *ASEAN deadlocked on South China Sea, Cambodia blocks statement* (26 July 2016) Reuters <<http://www.reuters.com/article/us-southchinasea-ruling-asean-idUSKCN1050F6>>.

²⁰ Isaac B Kardon, 'China's Maritime Rights and Interests: Organizing To Become A Maritime Power' (Paper presented at the China as a "Maritime Power" Conference, CNA Conference Facility, Arlington, Virginia, 28-29 July 2015), 32.

²¹ See Le Hong Hiep, 'Vietnam's South China Sea Disputes with China: The Economic Determinants' (2014) 26(2) *Korea Journal of Defense Analysis* 175, 177; see also Leonardo Bernard, 'The Right to Fish and International Law in the South China Sea' 2016 4(1) *Journal of Political Risk* 1, 12.

enforcement vessels in the South China Sea. Indeed, many Chinese law enforcement vessels have been used to harass fishing vessels of smaller littoral States and to prevent them from accessing waters claimed by China.²² It has also become apparent that China is using many of its fishing vessels as maritime militia to advance China's maritime claims and to support Chinese law enforcement agencies in disputed areas of the East and South China Seas.²³ Furthermore, China has adopted a restrictive view on LOSC navigational regimes in order to deter the United States from using the South China Sea. For example, while the United States and other maritime user States are of the view that the LOSC grants vessels and aircraft of foreign States the ability to conduct military activities in the exclusive economic zone (EEZ) of coastal States, China does not allow such activities in its own EEZ.²⁴ With respect to its historic water claim, it is not even clear what China is actually claiming. Instead, China interprets international law provisions narrowly to suit its own interests, and has evinced an intention to reject any decision or award by an international arbitral tribunal. This can be seen in China's response to the arbitral tribunal's recent ruling in the South China Sea dispute. Not only did China refuse to participate in this arbitration, it also ignored the arbitral tribunal's ultimate decision.²⁵ To avoid being isolated from regional security fora, China is willing to participate in regional confidence building measures. However, when it comes to

²² For example, Chinese law enforcement vessels have harassed and sunk a number of Vietnamese fishing vessels around the Paracel Islands, and have blocked Philippine fishing vessels from accessing resources in Scarborough Shoal. See Chapter seven of this thesis for a detailed discussion.

²³ James Kraska and Michael Monti, 'The Law of Naval Warfare and China's Maritime Militia' (2015) 91 *International Law studies* 450, 452.

²⁴ See Chapter six of this thesis for a detailed discussion.

²⁵ See *Full Text: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (13 July 2016) Xinhuanet <http://news.xinhuanet.com/english/china/2016-07/13/c_135509153.htm>.

agreements, China always prefers non-legally binding arrangements.²⁶ This strategy gives China a certain flexibility to manoeuvre in accordance with its own interests.

Thirdly, as smaller littoral States are reliant on foreign companies and governments to explore and exploit non-living resources, China uses diplomacy to prevent the development of any resource-related activities. Many diplomatic objections to hydrocarbon projects in the South China Sea have been made by China in order to deter foreign companies from cooperating with other claimant States on resource exploration.²⁷ Moreover, China has increased oil and gas exploration and exploitation in disputed areas of the South China Sea, using its military and maritime law enforcement vessels and aircraft to threaten and harass vessels of other claimant States while protecting its own areas of operation.²⁸

Lastly, with its growing economic power, in addition to modernising its military forces and maritime law enforcement agencies, China continues to expand its footprint in the region. Since 2013, China has carried out an extensive artificial island-building program on its occupied features in the Spratly Islands that can be used as forward operating bases for its maritime forces. In 2016, China landed a number of civilian aircraft on artificial islands in the Spratlys,²⁹ and deployed surface-to-air missiles to Woody Island in the Paracels.³⁰ According to the *Washington Times*, many hardened and concrete hangars capable of housing fighter and strategic bombers, as well as air-refuelling aircraft, have been built on various artificial islands built by China in the

²⁶ For example, China signed the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) and the 2014 Code for Unplanned Encounters at Sea (CUES), both of which are non-legally binding instruments.

²⁷ Fravel, above n 15, 300-303.

²⁸ For example, the May 2014 placing of an oil rig within the waters claimed by Vietnam. For details, see Chapter Seven of this thesis.

²⁹ *China lands more civilian planes on Fiery Cross reef* (7 January 2016) BBC NEWS <<http://www.bbc.com/news/world-asia-china-35249092>>.

³⁰ Katie Hunt, Jim Sciutto and Tim Hume, *China said to deploy missiles on South China Sea island* (18 February 2016) CNN <<http://edition.cnn.com/2016/02/16/asia/china-missiles-south-china-sea/>>.

Spratlys.³¹

It is clear that China has adopted an assertive stance in extending its maritime security buffer zones, claiming living and non-living resources, as well as projecting its military footprint in the South China Sea. However, in order to avoid armed conflict, China has thus far applied the tactic of low-level coercion, using its maritime law enforcement and fishing vessels rather than military forces to assert its maritime claims.³² According to James Kraska, “[b]y using asymmetric maritime forces – principally fishing vessels and coast guard ships – China is slowly but surely absorbing the South China Sea and East China Sea into its domain.”³³

China’s strategy in the South China Sea has been described as a “salami slice” strategy, or as Ashley Townshend and Rory Medcalf have proposed, a “passive assertive approach to consolidate its strategic gains in ways that reduce military risk.”³⁴ On the one hand, China continues to assert its maritime claims in the South China Sea, using the tactic of low-level coercion to avoid military confrontations with other claimant States while gradually consolidating its claims and taking control of disputed areas. On the other hand, China uses its economic leverage to dampen responses from smaller South China Sea littoral States. Moreover, China understands the strategic and economic importance of maintaining a stable relationship with the United States, and has sought to restrain the U.S. response to its assertive behaviour in the region. With its burgeoning economic and military power, China will reject any legal resolutions and

³¹ L. Todd Wood, *China builds hardened aircraft shelters in South China Sea* (9 August 2016) Washington Times <<http://www.washingtontimes.com/news/2016/aug/9/china-builds-hardened-aircraft-shelters-in-south-c/>>.

³² For further details, see James Kraska, *How China Exploits A Loophole in International Law in Pursuit of Hegemony in East Asia* (January 2015) Foreign Policy Research Institute <<http://www.fpri.org/article/2015/01/how-china-exploits-a-loophole-in-international-law-in-pursuit-of-hegemony-in-east-asia/>>.

³³ Ibid.

³⁴ Ashley Townshend and Rory Medcalf, 'Shifting waters: China’s new passive assertiveness in Asian maritime security' (Lowy Institute, April 2016), 12.

prevent outside players, particularly the United States, India and Japan, from becoming involved in South China Sea issues.³⁵

3.2.2 Interests and strategies of smaller littoral States

For smaller littoral States, protecting their maritime claims, having access to resources, as well as maintaining peace, stability and security in the South China Sea are prime considerations. Of the six smaller littoral States in the region, Vietnam, Indonesia and the Philippines are among the world's top ten seafood producers.³⁶ Maintaining access to living resources in the South China Sea is not only critically important to fishermen in Southeast Asia, but also a top policy priority for littoral States. Access to oil and gas in the South China Sea is also crucial to smaller South China Sea claimant States. As many of the oil and gas fields being developed by Vietnam, Malaysia and the Philippines are located on their continental shelves but lie within the so-called “nine-dash line” claimed by China, securing access to these resources in accordance with international law is of paramount importance for these particular States. Ideally, preventing China from expanding its control over the area, while maintaining regional peace and stability through rule-based orders, is a clearly objective for all smaller littoral States. Moreover, for Taiwan, Vietnam, the Philippines, Indonesia, Malaysia and Brunei, the South China Sea represents a security buffer zone - one which protects these States from an outside attack, particularly from China. For Vietnam specifically, if China were to block the South China Sea, there would be no alternative sea lane to sustain Vietnam’s maritime trade, even with regional States. As a

³⁵ See Ankit Panda, *China's 'Red Line' Warning to Japan on South China Sea FONOPs Is Here to Stay* (29 August 2016) Diplomat <<http://thediplomat.com/2016/08/chinas-red-line-warning-to-japan-on-south-china-sea-fonops-is-here-to-stay/>>; see also Ben Blanchard, *China tells U.S. to stay out of South China Seas dispute* (15 July 2014) Reuters <<http://www.reuters.com/article/us-china-usa-asean-idUSKBN0FK0CM20140715>>.

³⁶ *Fisheries: Catch the potentials* (8 July 2016) Invest in ASEAN <<http://investasean.asean.org/index.php/page/view/fisheries>>.

result, maintaining peace and stability in the South China Sea, and avoiding military confrontation with China, is critical to the Hanoi's security interests.³⁷

With the exception of China and Taiwan, all other littoral States are members of ASEAN, and therefore their security strategies have centred mainly on ASEAN frameworks. In order to mitigate China's military and economic power in the South China Sea disputes, Southeast Asian States have tried to engage China in a multi-layered web of regional and international institutions, thereby incorporating China into their own security commitments.³⁸ The ASEAN Dialogue Partnerships, the ASEAN Regional Forum (ARF), the ASEAN Plus Three, the East Asian Summit (EAS), and the ASEAN Defence Ministers Meeting Plus (ADMM-Plus) are examples of multilateral forums which bring together ASEAN countries, China, as well as other powers to discuss regional security. All of these regional forums are centred on ASEAN, and thus ASEAN can set agendas and further its objectives in accordance with international law and universally acceptable norms. The signing of the Declaration on the Conduct of Parties in the South China Sea (DOC) between China and ASEAN in 2002 is considered one of ASEAN's successes as it directly engaged China in a regional cooperative process.³⁹ Even though the DOC is a non-binding document, it was considered a significant achievement by ASEAN at the time.⁴⁰ ASEAN countries have also welcomed extra-regional powers into the region, including the United States, Japan, India, Australia and South Korea. However, ASEAN members are not always

³⁷ See Thuy, Tran Truong, 'International Dimensions of National (In) Security Concepts, Challenges and Ways Forward' (Paper presented at the Berlin Conference on Asian Security, Berlin, 14-16 June 2015) <https://www.swp-berlin.org/fileadmin/contents/projects/BCAS2015_Tran_Truong_Thuy_Web.pdf>.

³⁸ Fravel, above n 15, 262.

³⁹ Thuy Truong Tran, *Compromise and cooperation on the sea: The case of signing the declaration on the conduct of parties in the South China Sea* (24 February 2011)

<<http://nghienqubiendong.vn/en/conferences-and-seminars-/509-compromise-and-cooperation-on-the-sea-the-case-of-signing-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea>>.

⁴⁰ Ibid.

united when dealing with China in the South China Sea. Vietnam and the Philippines tend to be proactive in their dealings with China. Indonesia, Malaysia, Brunei, and Singapore have assumed a more abstemious attitude, while Cambodia, Laos, Thailand and Myanmar invariably try to accommodate China.⁴¹ Cambodia's willingness to defer to China was evident at the 45th ASEAN Foreign Ministers Meeting in 2012.⁴² As previously mentioned, this meeting, which was held under Cambodia's chairmanship, failed to issue a joint communiqué for the first time in ASEAN's history due to disagreements over South China Sea issues. The third ADMM – Plus meeting held in Malaysia in 2015 also failed to issue a joint declaration due to a lack of consensus on the South China Sea disputes.⁴³

Littoral States within ASEAN have also tried to resolve their overlapping maritime boundaries in the South China Sea in accordance with international law, particularly the LOSC.⁴⁴ The joint submission by Vietnam and Malaysia to the UN Commission on the Limits of the Continental Shelf clearly indicated that both States consider the disputed features in the Spratly Islands to be no more than “rocks” under article 121 of the LOSC.⁴⁵ This implies that Vietnam and Malaysia share the same view – that is, that none of the features in the Spratly Islands are entitled to an exclusive economic zone. This view echoes the arbitral tribunal's recent ruling that none of the high-tide features in the Spratly Islands “generate entitlement to an exclusive economic

⁴¹ McDevitt, above n 1.

⁴² Carlyle A Thayer, 'ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?' (2012) 10(34) *Asia-Pacific Journal* 1, 1-22.

⁴³ Yeganeh Torbati and Trinna Leong, *ASEAN defense chiefs fail to agree on South China Sea statement* (4 November 2015) Reuters <<http://www.reuters.com/article/us-asean-malaysia-statement-idUSKCN0ST07G20151104>>.

⁴⁴ See Chapter two for a detailed discussion of maritime boundary agreements between South China Sea littoral States.

⁴⁵ Clive Schofield, 'What's at stake in the South China Sea? Geographical and geopolitical considerations' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) , 31.

zone or continental shelf.”⁴⁶ This ruling, if fully respected, could help narrow down the disputed areas in the South China Sea. Some ASEAN States have even issued their own laws and regulations regarding their claims in the South China Sea. The Philippine Baseline Law 1999,⁴⁷ and the Law of the Sea of Vietnam 2012,⁴⁸ are examples of efforts by littoral States to more closely align their domestic laws with the LOSC.

Apart from ASEAN, littoral States have enhanced their military and law enforcement capabilities in order to protect their sovereignty and interests in the region. Recognising that their military capabilities cannot match those of China, littoral States have directed their spending on sea denial capabilities within the South China Sea.⁴⁹ Vietnam, the Philippines, Malaysia, Indonesia, Taiwan and Brunei all plan to buy new military assets to enhance their military capabilities.⁵⁰ Of the smaller claimant States, Vietnam and the Philippines have both reacted firmly and unequivocally to China’s growing assertion. However, due to different political ideologies, foreign policies, as well as military and maritime capabilities, their strategies in the South China Sea are quite different.

To counter China’s ambition to dominate the South China Sea, Vietnam has pursued a number of strategies, including hard power and diplomatic approaches. On the one hand, with its “Three-nos” defence policy (no military alliances, no foreign military bases on its territory, and no reliance on any country to fight against a third

⁴⁶ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [646]. The arbitral tribunal uses the term “high-tide features” for all features that are above water at high tide.

⁴⁷ See *An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of The Philippines and for Other Purposes* (Republic Act No. 9522) approved 10 March 2009.

⁴⁸ See *The Law of the Sea of Vietnam*, signed on 21 June 2012 (entered into force 1 January 2013).

⁴⁹ For further information, see Davies, Andrew, ‘Asian military trends and their implications for Australia’ 42 *Strategic Insights* 1, 1-25.

⁵⁰ See Chapter Two of the thesis for further information.

country)⁵¹, Vietnam has strengthened its maritime forces, including naval, coast guard and fisheries surveillance forces.⁵² On the other hand, given that Vietnam's maritime forces cannot match China's military prowess, Vietnam has actively sought to internationalise the South China Sea disputes, garnering support from extra-regional players while simultaneously maintaining an open dialogue with China through different channels, including diplomatic, military and party-to-party channels.⁵³ Vietnam is open to external players, particularly the United States, Japan, India and Australia playing constructive roles in maintaining peace, security and freedom of navigation in the South China Sea in accordance with international law. However, Vietnam does try to avoid escalating tensions with China over the South China Sea issues.⁵⁴ It is important to note that while the South China disputes represent a critical factor in the relationship between Vietnam and China, it is not the only factor. China is Vietnam's largest trading partner and shares Vietnam's nominal political ideology. As Carlyle Thayer has opined, Vietnam tries to manage its relationship with China - a much larger neighbour - "under conditions of mature asymmetry", with "Vietnam and China hav[ing] too much at stake to allow the present period of mature asymmetry to revert back to hostile asymmetry due to territorial disputes in the South China Sea."⁵⁵ As a result, balancing strategic re-alignment with China on the one hand, and other outside players (particularly the United States) on the other hand, is important to

⁵¹ See *Buying weapons to safeguard fatherland* (30 April 2013) Tuoitrenews <<http://tuoitrenews.vn/politics/9164/buying-weapons-to-safeguard-fatherland>>.

⁵² See Chapter Two of the thesis for a detailed discussion on this topic.

⁵³ See Carlyle A Thayer, 'The Tyranny of Geography: Vietnamese Strategies to Constrain China in the South China Sea' (2011) 33(3) *Contemporary Southeast Asia* 348, 348-69.

⁵⁴ Truong Minh Vu and Nguyen Thanh Trung, *Vietnam's South China Sea Challenge* (19 August 2016) National Interest <<http://nationalinterest.org/blog/the-buzz/vietnams-south-china-sea-challenge-17407>>; Gregory Poling, *While Courting China, Vietnam Prepares For a Future South China Sea Crisis* (21 September 2016) World Politics Review <<http://www.worldpoliticsreview.com/articles/19978/while-courting-china-vietnam-prepares-for-a-future-south-china-sea-crisis>>.

⁵⁵ Thayer, above n 53, 364.

Vietnam's foreign policy. Following the Haiyang Shiyu 981 oil rig incident, there have been no major maritime incidents between the vessels and aircraft of the two States in the South China Sea. Indeed, it could be argued that Vietnam has been successful in dissipating China's assertiveness in the region, and that China has shown signs of diffusing tensions with Vietnam over the South China Sea disputes. In April 2015, the General Secretary of Vietnam's Communist Party, Nguyen Phu Trong, visited China, and in November 2015 Chinese President Xi Jinping became the first Chinese president in ten years to visit Vietnam.⁵⁶ These diplomatic visits indicate that the two sides are seeking to better manage their relations in the wake of the oil rig incident.

Unlike Vietnam, the Philippines is a treaty ally of the United States, and has ramped up its defence cooperation with this powerful ally over disputes in the South China Sea. On 12 January 2016, the Philippine Supreme Court upheld the Enhanced Defence Cooperation Agreement (EDCA) signed by the Philippines and the United States in 2014 - an agreement which grants U.S. forces a presence in selected Philippine military bases.⁵⁷ The Philippines has also strengthened its defence relationship with Japan and India. In February 2015, Japan and the Philippines signed an agreement on defence equipment transfer.⁵⁸ The signing of this agreement is a clear indication of the increasing defence cooperation between the two States. Accordingly, the Philippines expects to receive at least five TC-90s reconnaissance aircraft on loan from the Japanese

⁵⁶ See *Vietnam officials visit China to ease tensions after oil rig spat* (9 April 2015) South China Morning Post <<http://www.scmp.com/news/china/policies-politics/article/1758725/vietnam-officials-visit-china-ease-tensions-after-oil>>; see also *Xi Jinping visits Vietnam amid territorial disputes over the South China Sea* (5 November 2015) South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/1875829/xi-jinping-visits-vietnam-amid-territorial-disputes>>.

⁵⁷ Renato Cruz De Castro, *Philippine Supreme Court Approves EDCA: Unlocking the Door for the Return of U.S. Strategic Footprint in Southeast Asia* (1 February 2016) Asia maritime Transparency Initiative <<http://amti.csis.org/philippine-supreme-court-approves-edca-unlocking-door-return-u-s-strategic-footprint-southeast-asia/>>.

⁵⁸ Reynolds, Isabel, *Japan, Philippines Seal Defense Equipment Transfer Deal* (29 February 2016) Bloomberg <<https://www.bloomberg.com/news/articles/2016-02-29/japan-seals-defense-equipment-transfer-deal-with-the-philippines>>.

Maritime Self-Defence Force (JMSDF), which will enable it to increase maritime patrols in the South China Sea.⁵⁹ In 2015, Japan also provided the Philippines with a low-interest loan of US\$150 million to buy ten patrol vessels from Japan. These vessels will be used to enhance the capability of the Philippine Coast Guard.⁶⁰ The Philippines has also improved its defence cooperation with India. At the third Meeting of the India-Philippines Joint Commission on Bilateral Cooperation held in New Delhi in October 2015, the two States agreed “to further strengthen defence and security cooperation in the areas of maritime domain awareness.”⁶¹

Moreover, as its military forces cannot match those of China, in 2013 the Philippines sought a legal resolution to its maritime disputes with China in the South China Sea as noted earlier. Although China refused to participate in the proceedings, the arbitral tribunal proceeded without China’s involvement. On 12 July 2016, the arbitral tribunal issued its award in favour of the Philippines. In effect, the legal strategy adopted by the Philippines has forced China to choose between its maritime ambitions in the South China Sea and its reputation in the wider international community. The award of the arbitral tribunal is certainly considered a landmark win for the Philippines, but it remains to be seen how the award will affect China’s dealings with other claimants in the South China Sea disputes.⁶²

⁵⁹ Tom Holcombe, *Japan’s capacity building strategy at work in the Philippines* (22 March 2015) Interpreter <<http://www.lowyinterpreter.org/post/2016/03/22/Japans-capacity-building-strategy-at-work-in-the-Philippines.aspx>>.

⁶⁰ Toko Sekiguchi, *Japan to Provide Patrol Vessels to Philippines* (4 June 2015) Wall Street Journal <<http://www.wsj.com/articles/japan-to-provide-patrol-vessels-to-philippines-1433424771>>.

⁶¹ *Joint Statement : Third India-Philippines Joint Commission on Bilateral Cooperation* (14 October 2015) Indian Ministry of External Affairs <<http://mea.gov.in/bilateral-documents.htm?dtl/25930>>.

⁶² Sam Bateman et al, 'Assessing the South China Sea Award' (2016) 108(August) *Strategic Insights* 1, 1; see also Ankit Panda, *International Court Issues Unanimous Award in Philippines v. China Case on South China Sea* (12 July 2016) Diplomat <<http://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/>>.

3.3 Interests and strategies of extra-regional powers

The geographical position of the South China Sea gives it strategic significance not only for littoral States but also for extra-regional powers, including the United States, Japan, India and Australia. However, each of these States has different interests in the South China Sea, and as a result their strategies are also quite different.

3.3.1 The United States

Apart from the economic importance of the South China Sea (as discussed in Chapter two of the thesis), this region has been used by the U.S. Navy and Air Force as an operating area and as a transit point between its military bases in Asia and the Indian Ocean and Persian Gulf. Therefore, maintaining peace, safety and freedom of navigation and overflight in accordance with international law is of vital strategic interest to the United States.⁶³ At an ARF meeting in July 2010, U.S. Secretary of State, Hillary Clinton, affirmed that:

...As a Pacific nation and resident power, the United States has a national interest in freedom of navigation, the maintenance of peace and stability, respect for international law, and unimpeded lawful commerce in the South China Sea...⁶⁴

Although the United States does not take sides regarding territorial disputes, it does encourage claimants to resolve such disputes peacefully and in accordance with international law.⁶⁵ In addition, the United States has rejected China's "nine-dash line" claim, and has publically urged China to stop its extensive artificial island-building

⁶³ Patrick Ventrell, *South China Sea Press Statement* (3 August 2012) U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2012/08/196022.htm>>; see also Jian Yang, 'Navigating the Volatile South China Sea' (2011) 36(5) *New Zealand International Review* 2, 3.

⁶⁴ Hillary Rodham Clinton, *Remarks to the ASEAN Regional Forum* (12 July 2012) U.S. Department of State <<http://www.state.gov/secretary/rm/2012/07/194987.htm>>.

⁶⁵ Ibid.

program in the Spratlys.⁶⁶

Honouring its commitment to regional allies is another U.S. priority. The United States is a treaty ally of the Philippines under the 1951 Mutual Defence Treaty. Article IV of this Treaty provides that:

Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes...⁶⁷

Article V states that:

For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.⁶⁸

There have been different interpretations of this Treaty regarding the response of the United States in the event of an armed attack on one of the offshore islands claimed by the Philippines in the South China Sea. To date, there has been no official declaration by either side on the level of commitment which would be made if such an attack were to occur. Even though the United States does not take sides in territorial disputes, it is clear from the text of the treaty that if an armed attack were to take place on the armed forces, public vessels or aircraft of the Philippines in the South China Sea, then the United States would be obliged to become consult. The scope of the U.S. involvement, however, would depend upon the diplomatic, political and security environment at the time.

⁶⁶ See United States Department of State *Limits in the Seas: China Maritime Claims in the South China Sea* (December 5, 2014); see also *US calls for land reclamation 'halt' in South China Sea* (30 May 2015) BBC <<http://www.bbc.com/news/world-asia-32941829>>.

⁶⁷ *Mutual Defense Treaty Between the United States and the Republic of the Philippines* (entered into force on 31 August 1951), art 4.

⁶⁸ *Ibid* art 5.

Strengthening its regional influence in the region is another strategic interest of the United States. Indeed, maintaining the presence and unhindered passage of U.S. military vessels and aircraft in the South China Sea to sustain its power projection in the region and around the globe is strategically important. With the increasing number of incidents between vessels and aircraft of China and those of the United States in the South China Sea, as well as the rapid modernisation of China's Navy, it appears that the future of U.S. leadership in the Asia-Pacific region could be affected by China's rising power.⁶⁹ Ensuring a sustainable security environment in the South China Sea is therefore crucial to the U.S. rebalancing strategy towards the Asia-Pacific. Indeed, this will help the United States strengthen its political position in the region.

In an effort to maintain its influence in the region, the United States has enhanced its diplomatic, economic and security relations with surrounding States. Since 2009, the Obama Administration has adopted an engagement policy towards the Asia-Pacific region. In July 2009, the United States acceded to the ASEAN Treaty of Amity and Cooperation,⁷⁰ and in 2011, the U.S. President participated in the East Asia Summit for the first time. In his 2011 speech before the Australian Parliament, President Barack Obama stated that “the United States will play a larger and long-term role in shaping this region and its future, by upholding core principles and in close partnership with our allies and friends.”⁷¹ According to Tom Donilon, National Security Advisor to President Obama, the ultimate goal of the rebalancing policy toward the Asia-Pacific region is to ensure that “international law and norms are respected, that commerce and freedom of

⁶⁹ Patrick M Cronin and Robert D Kaplan, 'Cooperation from Strength: U.S. Strategy and the South China Sea' in Patrick M. Cronin (ed), *Cooperation from Strength: The United States, China and the South China Sea* (Center for New American Security, 2012) , 7.

⁷⁰ *United States Accedes to the Treaty of Amity and Cooperation in Southeast Asia* (22 July 2009) U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2009/july/126294.htm>>.

⁷¹ *Remarks By President Obama to the Australian Parliament* (17 November) The White House <<https://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>>.

navigation are not impeded, that emerging powers build trust with their neighbours, and that disagreements are resolved peacefully without threats or coercion.”⁷² Under this rebalancing policy, the United States has directed more resources toward the region, including military, diplomatic, economic and strategic support.⁷³

In relation to military resources, on 5 January 2012, President Obama announced a new Defense Strategic Guidance policy titled *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense*. This policy reaffirmed that “while the U.S. military will continue to contribute to security globally, we will of necessity rebalance toward the Asia-Pacific region.”⁷⁴ The Defense Strategic Guidance introduced a new “Air-Sea Battle” concept, proposed a service collaboration to address anti-access and area denial challenges, and confirmed that “the U.S. military will invest as required to ensure its ability to operate effectively in anti-access and area denial (A2/AD) environments.”⁷⁵ In his remarks at the Asia Society New York on 11 March 2013, Donilon stated that:

[in] the coming years a higher proportion of our military assets will be in the Pacific. Sixty percent of our naval fleet will be based in the Pacific by 2020. Our Air Force is also shifting its weight to the Pacific over the next five years. We are adding capacity from both the Army and the Marines. The Pentagon is working to prioritize the Pacific Command for our most modern capabilities – including submarines, Fifth-Generation Fighters such as F-22s and F-35s, and reconnaissance platforms.⁷⁶

As an integral component of the U.S. Defence strategy, the “Air-Sea Battle” concept provides the opportunity for the United States to “maintain freedom of action in the

⁷² Tom Donilon, *America is back in the Pacific and will uphold the rules* (27 November 2011) Financial Times <<http://www.ft.com/intl/cms/s/0/4f3febac-1761-11e1-b00e-00144feabdc0.html#axzz3i0PhgvJi>>.

⁷³ Gregory H Whitten and Erum R Jilani, *Rebalance to the Asia-Pacific* (28 June) Kennedy School Review <<http://harvardkenedyschoolreview.com/rebalance-to-the-asia-pacific/>>.

⁷⁴ *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense* (U.S. Department of Defense, 2012), 2.

⁷⁵ Ibid 4.

⁷⁶ Thomas Donilon, *Complete Transcript: Thomas Donilon at Asia Society New York* (11 March) Asia Society <<http://asiasociety.org/new-york/complete-transcript-thomas-donilon-asia-society-new-york>>.

global commons, and secure operational access to enable concurrent or follow-on joint operations.”⁷⁷ Notionally, the concept does not seek to directly target any particular State. However, as Benjamin Schreer has observed, “the US military’s increased focus on China has given the concept much prominence in the strategic community.”⁷⁸ In April 2014, the United States and the Philippines signed the Enhanced Defense Cooperation Agreement (EDCA), which allows U.S. forces to use Philippines military bases on a rotational basis.⁷⁹ According to Carlyle Thayer, this Agreement “reflects the desire of the Philippines and the U.S. for a more comprehensive agreement that covers the full range of enhanced defense cooperation.”⁸⁰ In August 2014, the United States and Australia signed the Force Posture Agreement, which increases the annual rotation of U.S. Marine Corps members and U.S. airmen in Darwin, northern Australia.⁸¹

The United States has also strengthened its defence relations with Singapore. In 1990, the two States signed a Memorandum of Understanding (MoU) Regarding United States Use of Facilities in Singapore. This MoU allows U.S. air and naval forces to expand their access to Singaporean facilities.⁸² In 2005, Singapore and the United States signed a Strategic Framework Agreement (SFA) which seeks to “expand the scope of defense and security cooperation” while affirming that “[c]ooperation between like-minded countries on defense and security issues is an essential part of effectively

⁷⁷ *Air-Sea Battle: Service Collaboration to Address Anti-Access and Area-Denial Challenges* (Air-Sea Battle Office, 2013) 1.

⁷⁸ Benjamin Schreer, *Planning the Unthinkable War: ‘Air Sea Battle’ and Its Implications for Australia* (Australian Strategic Policy Institute, 2013) 5.

⁷⁹ Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, signed on 18 April 2014.

⁸⁰ Carl Thayer, *Analyzing the US-Philippines Enhanced Defense Cooperation Agreement* (02 May 2014) The Diplomat <<http://thediplomat.com/2014/05/analyzing-the-us-philippines-enhanced-defense-cooperation-agreement/>>.

⁸¹ Jim Garamone, *Hagel Discusses U.S.-Australia Force Posture Pact* (11 August) U.S. Department of Defense <<http://www.defense.gov/news/newsarticle.aspx?id=122896>>.

⁸² Chris Rahman, 'Singapore: Forward Operating Site' in Carnes Lord and Andrew s Erickson (eds), *Rebalancing the Force: Basing and Forward Presence in the Asia-Pacific* (Naval Institute Press, 2014) , 119.

responding to threats to peace and stability.”⁸³ The United States has deployed a number of Littoral Combat Ships (LCS) to Singapore as part of its commitment to strengthening its military engagement in the Southeast Asia region. The first seven-month deployment of LCS to Singapore has already been completed, with potentially another four deployments to take place by the end of 2016.⁸⁴ Although Singapore is not a formal U.S. ally, Chris Rahman has commented that “Singapore has become the most important partner in the U.S. Pacific Command security network after the three main formal allies – Japan, South Korea, and Australia.”⁸⁵ That LCS have already been deployed to Singapore (and with further deployments to come), demonstrates that the United States is keen to enhance its presence in the South China Sea.

As part of its military rebalance to the Asia-Pacific, the United States has also strengthened its military presence in South Korea and Japan. Since 2009, the United States and South Korea have broadened their defence alliance “from its primary purpose of defending against a North Korean attack to a regional and even global partnership.”⁸⁶ In April 2015, the United States and Japan revised an existing agreement known as the Guidelines for Japan-U.S. Defense Cooperation. Under these Guidelines, the Japanese Self-Defense Forces and the United States Armed Forces “will provide mutual protection of each other’s assets, as appropriate, if engaged in activities that contribute to the defense of Japan in a cooperative manner.”⁸⁷ U.S. Secretary of State John Kerry also confirmed that “Washington’s commitment to Japan’s security remains ironclad and

⁸³ *Strategic Framework Agreement between the United States of America and the Republic of Singapore for a Closer Cooperation Partnership in Defense and Security*, signed 12 July 2015, arts 1&2.

⁸⁴ *US plans more LCS deployments to S’pore in next two years* (15 April 2014) <<http://www.todayonline.com/singapore/us-plans-more-lcs-deployments-spore-next-two-years>>.

⁸⁵ Rahman, above n 82, 121.

⁸⁶ Mark E Manyin et al, ‘U.S.-South Korea Relations’ (Congressional Research Service, 24 June 2014), 13.

⁸⁷ *The Guidelines for Japan-U.S. Defense Cooperation* (27 April 2015) Ministry of Defense <http://www.mod.go.jp/e/d_act/anpo/>.

covers all territories under Japan's administration, including the Senkaku Islands.”⁸⁸ This clear statement by the United States is qualitatively different from the situation with respect to disputed offshore features in the South China Sea (where the United States does not take sides). The Guidelines also enhance cooperation between the United States and Japan with regard to intelligence, surveillance, and reconnaissance in the maritime domain without geographical limitation.⁸⁹ This will hopefully contribute to the protection of maritime security and the freedom of navigation in the Asia-Pacific region.

The United States has also improved its relationship with Vietnam. The two States established a Comprehensive Partnership in July 2013, and in 2014 the U.S. removed part of its embargo on lethal weapon sales to Vietnam in order to help improve Vietnam’s maritime security.⁹⁰ In June 2015, U.S. Defense Secretary Ashton Carter and Vietnamese Defence Minister Phung Quang Thanh signed the Joint Vision Statement on Defence Relations, with the two States committing to deepen their defence relationship.⁹¹ Carter also announced that Washington would provide \$18 million to help Vietnam improve its maritime defence capabilities.⁹² In a meeting with U.S. President Obama during his visit to the United States in July 2015, Vietnamese Communist Party Leader Nguyen Phu Trong stated that “we have been transformed

⁸⁸ Quoted in *US-Japan defence deal: 'Historic' new rules to allow Japanese forces wider role amid concerns over China* (1 May 2015) ABC <<http://www.abc.net.au/news/2015-04-28/us-japan-ramp-up-defence-cooperation-amid-china-concerns/6427418>>.

⁸⁹ See above n 87.

⁹⁰ *US eases arms embargo against Vietnam for maritime security* (03 October 2014) Thanh Nien News <<http://www.thanhniennews.com/politics/us-eases-arms-embargo-against-vietnam-for-maritime-security-31954.html>>.

⁹¹ David J Lynch, *U.S. Touts Military Ties With Vietnam Amid China Sea Tension* (1 June 2015) Bloomberg <<http://www.bloomberg.com/news/articles/2015-06-01/u-s-touts-military-ties-with-vietnam-as-china-sea-tensions-rise>>.

⁹² David Alexander, *Pentagon chief pledges \$18 million for Hanoi to buy patrol boats* (31 May 2015) Reuters <<http://www.reuters.com/article/2015/05/31/us-vietnam-usa-defense-idUSKBN0OG0NB20150531>>.

from former enemies to become friends, partners, and comprehensive partners. And I'm convinced that our relationship will continue to grow in the future.”⁹³ In May 2016, during his official visit to Vietnam, President Obama announced that the United States would fully lift its embargo on lethal weapons sales to Vietnam in an effort to normalise relation between the two States.⁹⁴

In addition to sending military forces into the region and strengthening diplomatic and security cooperation with regional allies and friends, the United States has improved economic ties with regional States. The Trans-Pacific Partnership (TPP) Agreement - a proposed free trade agreement between the United States and 11 other States including Australia, New Zealand, Canada, Mexico, Peru, Chile, Singapore, Brunei, Malaysia, Japan and Vietnam, is one such example. Significantly, China has not been included among the TPP States. Speaking at the Nike factory in Oregon on 8 May 2015, President Barack Obama stated that:

We have to make sure America writes the rules of the global economy and we should do it today while our economy is in a position of global strength. If we don't write the rules for trade around the world, guess what, China will. And they'll write those rules in a way that gives Chinese workers and Chinese businessmen the upper hand.⁹⁵

As the 12 TPP States collectively make up almost 40 per cent of global gross domestic product (GDP), the TPP Agreement is “a concrete manifestation of [the U.S.] strategy of rebalancing toward Asia.”⁹⁶ Although all 12 States signed the agreement in October

⁹³ Jeff Mason, *Obama, Vietnam leader discuss South China Sea in landmark meeting* (7 July 2015) Reuters <<http://www.reuters.com/article/2015/07/07/us-vietnam-usa-sea-idUSKCN0PH1YY20150707>>.

⁹⁴ Gardiner Harris, *Vietnam Arms Embargo to Be Fully Lifted, Obama Says in Hanoi* (23 May 2016) New York Times <<http://www.nytimes.com/2016/05/24/world/asia/vietnam-us-arms-embargo-obama.html>>.

⁹⁵ Quoted in James O'Neill, *The Trans-Pacific Partnership : A Free Trade Agreement?* (21 June 2015) New Eastern Outlook <<http://journal-neo.org/2015/06/21/the-trans-pacific-partnership-a-free-trade-agreement/>>.

⁹⁶ *Strategic Importance of TPP* (26 August 2016) Office of the United States Trade Representative <<https://ustr.gov/sites/default/files/TPP-Strategic-Importance-of-TPP-Fact-Sheet.pdf>>.

2015, it can only come into effect 60 days after all the original signatories have ratified the agreement, or when at least six States which together account for at least 85 per cent of the total GDP of the 12 original signatories ratify the agreement within two years from the date of signing.⁹⁷ As both Republican and Democratic 2016 presidential candidates oppose the TPP Agreement, it is unlikely that the U.S. Senate will discuss agreement's ratification until after the November 2016 election.⁹⁸ That the ratification process will be delayed in the United States, together with domestic protests over the agreement in some States, particularly New Zealand and Australia, indicates a degree of skepticism regarding the efficacy of the TPP.⁹⁹ If the TPP cannot enter into force, the strategy of rebalancing toward Asia as well as the U.S. leadership role in the region will be compromised.

To reaffirm navigational rights in the South China Sea, Secretary Carter has declared that “[t]he United States will fly, sail, and operate wherever international law allows, as we do around the world, and the South China Sea is not and will not be an exception.”¹⁰⁰ The United States has conducted a number of operational assertions in the South China Sea under the Freedom of Navigation (FON) Program to challenge China's excessive maritime claims. Examples of this include: the *USS Fort Worth* patrolling the maritime area near the Spratly Islands on 11 May 2015; a *U.S. P8-A*

⁹⁷ See article 30.5 of *Trans-Pacific Partnership Agreement* (26 January 2016) Australian Department of Foreign Affairs and Trade <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>.

⁹⁸ Stephen Dinan, *Democrats Gear Up to Stop Obama on TPP Trade Deal* (12 August 2016) Washington Times <<http://www.washingtontimes.com/news/2016/aug/12/democrats-gear-stop-obama-tpp-trade-deal/>>.

⁹⁹ Lucy Cormack, *Protesters Rally Against the Trans-Pacific Partnership in Martin Place* (23 August 2015) Sydney Morning Herald <<http://www.smh.com.au/federal-politics/political-news/protesters-rally-against-the-transpacific-partnership-in-martin-place-20150823-gj5q0v.html>>; Catherine Putz, *TPP: The Ratification Race is On* (5 February 2016) Diplomat <<http://thediplomat.com/2016/02/tpp-the-ratification-race-is-on/>>.

¹⁰⁰ *Remarks With Secretary of Defense Ash Carter, Australian Foreign Minister Julie Bishop, and Australian Defense Minister Marise Payne* (13 October 2015) U.S. Department of State <<http://www.state.gov/secretary/remarks/2015/10/248180.htm>>.

Poseidon surveillance aircraft conducting overflights over China's artificial islands in the Spratly Islands on 20 May 2015; the *USS Lassen* conducting a patrol within 12 nautical miles of the artificial island built by China on Subi Reef in the Spratly Islands; and the *USS Curtis Wilbur* exercising innocent passage within 12 nautical miles of Triton Island.¹⁰¹ Even though FON operations cannot address the root causes of tensions, they may help challenge China's excessive claims in the South China Sea.

The United States has also affirmed its "respect and support for ASEAN Centrality and ASEAN – led mechanisms in the evolving regional architecture of the Asia-Pacific."¹⁰² The United States certainly encourages ASEAN States to support the rule of law and the principle of freedom of navigation under international law. At the Special U.S.-ASEAN Leaders Summit held in February 2016, the United States and ASEAN declared their "commitment to maintain peace, security and stability in the region, ensuring maritime security and safety, including the rights of freedom of navigation and overflight and other lawful uses of the seas."¹⁰³

In summary, the United States remains focused on maintaining the freedoms of navigation and overflight in the South China Sea, as well as preserving regional stability through abiding respect for international law rules and norms. On the one hand, the United States insists that all claimant States should resolve their disputes peacefully and in accordance with international law. In this regard, the United States shows deference to the central role of ASEAN in regional affairs. On the other hand, the United States has affirmed its navigational rights in the South China Sea by conducting FON operations. Although the United States tacitly challenges China's excessive maritime

¹⁰¹ See Chapter eight of this thesis for a detailed discussion of these operations.

¹⁰² *Joint Statement of the U.S.-ASEAN Special Leaders' Summit: Sunnylands Declaration* (16 February 2016) The White House <<https://www.whitehouse.gov/the-press-office/2016/02/16/joint-statement-us-asean-special-leaders-summit-sunnylands-declaration>>.

¹⁰³ Ibid.

claims, it also seeks to avoid any direct conflict. A key component of the U.S. strategy has been to strengthen its strategic and political relations with its regional allies and friends, but it has also (and rather unexpectedly) tried to positively engage with China to resolve regional and global problems. As the South China Sea is not only a central strategic issue in the relationship between China and the United States, it is to be expected that the United States will: (i) continue to assert the freedoms of navigation and overflight in the South China Sea; (ii) strengthen its security relations with regional States; and (iii) eschew any display of open aggression against China which would escalate existing regional tensions and/or lead to direct conflict.

3.3.2 Japan

With more than 90 per cent of Japan's oil imports transiting through the South China Sea, ensuring the freedom of navigation and the safety and security of SLOCs in the region is a main priority for Japan. In light of China's increasing military presence in the Paracel Islands, its extensive artificial island-building program in the Spratly Islands and potential artificial-island building program in Scarborough Shoal, Japan's fear of China one day controlling the South China Sea is well founded. If China did exercise control over the region, this would undoubtedly have a significant strategic impact on Japan.

China's increasingly aggressive posture in the South China Sea also has the potential to weaken the rule of law at both the national and international level. If this were to occur, Japan's position in its maritime disputes with China in the East China Sea would be undermined.¹⁰⁴ Therefore, maintaining stable security in the region and adherence to international law rules and norms is in Japan's national interest. Moreover,

¹⁰⁴ Ian Storey, 'Japan's Growing Angst over the South China Sea' (2013) 20 *ISEAS Perspective* 1, 2.

as Japan and the United States are treaty allies, if armed conflict involving the United States were to break out in the South China Sea, Japan would be required to provide logistical support to U.S. forces at the very least.

In light of the above concerns, Japan has tried to strengthen ASEAN solidarity, calling for the implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC), as well as the negotiation of a Code of Conduct in the South China Sea (COC).¹⁰⁵ Not only has Japan supported the efforts of Vietnam and the Philippines in strengthening their maritime law enforcement capabilities, it has also assisted the United States in its rebalancing policy towards the Asia-Pacific.¹⁰⁶ In 2015, Japan provided six second-hand patrol ships to the Vietnamese Coast Guard as part of a US\$4 million aid program, and there are plans for Japan to provide Vietnam with brand new ships to help it strengthen its maritime security responses.¹⁰⁷ Last year Japan provided the Philippines with a low-cost interest loan of US\$150 million to buy ten patrol vessels from Japan to enhance the capability of the Philippine Coast Guard.¹⁰⁸ Japan has also encouraged other maritime powers including the United States, India and Australia to cooperate in safeguarding maritime interests and rule-based order in the region.¹⁰⁹

Over the past few years, Japan's security policy has undergone major changes, leading to improved engagement with regional security matters. In April 2014, Japan lifted its ban on arms exports, paving the way for greater cooperation with its partners, including ASEAN States, in weapons' procurement and development. In July 2014, Japan revised its interpretation of Article 9 of its Constitution, with the result that the

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, 7.

¹⁰⁷ *Japan considers providing new ships to Vietnam's coast guard* (6 May 2016) Vietnam Breaking News <<https://www.vietnambreakingnews.com/2016/05/japan-considers-providing-new-ships-to-vietnams-coast-guard/>>.

¹⁰⁸ Sekiguchi, above n 60.

¹⁰⁹ Storey, above n 104, 7.

country's defence forces are now permitted to engage with other States and exercise the right of collective self-defence without geographical limitation.¹¹⁰ Moreover, in September 2015, Japan passed new security legislation explicitly setting out this revised interpretation of Article 9. Under the new legislation, Japan may invoke the right to collective self-defence when responding to an armed attack against itself or a foreign country which threatens Japan's survival, or in circumstances where there exists no other appropriate means to repel the attack.¹¹¹ According to Yoji Koda, with the passage of this new security legislation, "the possibility of JSDF (Japan Self-Defence Force) military operations in the South China Sea...will become greater than before."¹¹² Japan is involved in maritime disputes with China in the East China Sea, particularly over the Senkaku/Diaoyu Islands. If a conflict transpired in this area, Japan has the right to intervene without changing its defence policy and without having to reinterpret its Constitution. The situation in the South China Sea, however, is another story altogether insofar as Japan is concerned. Lionel P. Fatton has commented that "[n]owhere are the impacts of the revamp of the Japanese security architecture more evident than in the South China Sea."¹¹³

In summary, Japan has a stake in the South China Sea, but not as a South China Sea claimant State. To date, Japan has only played a modest role in pursuing stable security in the region. However, if China continues to assert its maritime claims, ramping up its militarisation in the South China Sea and ignoring international law rules and norms, it is likely that Japan's involvement in the South China Sea will escalate.

¹¹⁰ See *The Constitution of Japan* (3 May 1947) Prime Minister of Japan and His Cabinet <http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html> .

¹¹¹ See *Japan's Legislation for Peace and Security* (16 March 2015) Ministry of Foreign Affairs of Japan <<http://www.mofa.go.jp/files/000143304.pdf>>.

¹¹² Yoji Koda, 'Japan's Perceptions of and Interests in the South China Sea' (2016) 21(January) *Asia Policy* 29, 32.

¹¹³ Lionel P Fatton, 'Japan's New Security Policy: Toward Regional Involvement at Sea' (2016) 4(April) *Geneva Centre for Security Policy* 1, 4.

3.3.3 India

India's interests in the South China Sea centre on the State's burgeoning trade and economic engagement with ASEAN and Northeast Asia, as well as its growing strategic interests in the region.¹¹⁴ With the value of its trade with East Asia expected to reach US\$100 billion by 2016, India is strengthening its economic engagement with the region. Indeed, this is one of the principal goals laid down in India's "Look East" Policy.¹¹⁵ During the 2014 India-ASEAN Summit in Myanmar, Indian Prime Minister Narendra Modi stated that his government had transformed the long standing "Look East" Policy into an "Act East" policy. According to Subhash Kapila, while the "Look East" policy was driven by India's economic and political imperatives, the "Act East" policy is propelled by its strategic significance in Southeast Asia.¹¹⁶ Approximately 25 per cent of India's sea borne trade passes through the South China Sea. Thus maintaining security and freedom of navigation in the region is critical to India.¹¹⁷ On 12 July 2016, the day the arbitral tribunal issued its award in the South China Sea arbitration, the Indian Ministry of External Affairs made a statement indicating that "India supports freedom of navigation and over-flight, and unimpeded commerce, based on the principles of international law, as reflected notably in the UNCLOS."¹¹⁸ India's oil and gas exploration in the South China Sea also contributes to the region's economic prosperity and may assist to reduce India's energy deficit. Therefore, any maritime conflict in the South China Sea would negatively impact India's economic and national

¹¹⁴ Raman Puri and Arun Sahgal, 'The South China Sea Dispute: Implications for India' (2011) 6(4) *Indian Foreign Affairs Journal* 437, 445.

¹¹⁵ Ibid; see also S.D. Muni, 'India's 'Look East' Policy: The Strategic Dimension', *ISAS Working Paper*, No. 121, February 2011, 18-25.

¹¹⁶ Subhash Kapila, *India's 'Look East' and 'Act East' Policies Reviewed 2016* (18 January 2016) South Asia Analysis Group <<http://www.southasiaanalysis.org/node/1924>>.

¹¹⁷ Munmun Majumdar, 'India's stakes in the South China Sea' (2013) 3(13) (July) *International Journal of Humanities and Social Science* 242, 243.

¹¹⁸ Mohan Malik, *India's Response to the South China Sea Verdict* (22 July 2016) American Interest <<http://www.the-american-interest.com/2016/07/22/indias-response-to-the-south-china-sea-verdict/>>.

interests. In October 2011, India signed an oil exploration agreement with Vietnam despite objections from China. All these actions could be viewed as India supporting not only the freedom of navigation but also access rights to natural resources in the South China Sea in accordance with international law.¹¹⁹ In 2012, India's Union Minister Ashwani Kumar expressed the view that the "South China Sea is the property of the world. Nobody has a unilateral control over it and India is capable enough of safeguarding its interests."¹²⁰ To balance China's growing ambitions in the South China Sea, India has adopted a proactive approach to the region. Indeed, India has improved its military and security relations with Southeast Asian States, particularly Vietnam, Malaysia and the Philippines. This has been achieved by increasing its naval presence in the region, and particularly by conducting naval visits to Southeast Asian States. India has also engaged with the United States, Japan and Australia in a way which David Lang has described as "a coalition of like-minded democracies that stands for the established regional order and against unilateral attempts to change the status quo by force."¹²¹

It is clear that India has several interests in the South China Sea. However, due to budgetary constraints, India has focused its resources on the Indian Ocean, where it has vital strategic interests. Although India supports the freedoms of navigation and overflight, it is important to note that it shares the same view as China regarding foreign military activities in the EEZ of coastal States – a view which is inconsistent with the

¹¹⁹ Harsh V Pant, *Understanding India's Interest in the South China Sea: Getting into the Seaweeds* (18 December 2012) Center For Strategic & International Studies <<http://csis.org/publication/understanding-indias-interest-south-china-sea-getting-seaweeds>>.

¹²⁰ Palash Ghosh, *India And China Foreign Ministers Discuss South China Sea Disputes* (13 April 2012) International Business Times <<http://www.ibtimes.com/india-and-china-foreign-ministers-discuss-south-china-sea-disputes-437254>>.

¹²¹ David Lang, *The not-quite-quadrilateral: Australia, Japan and India* (July 2015) Australian Strategic Policy Institute <https://www.aspi.org.au/publications/the-not-quite-quadrilateral-australia,-japan-and-india/SI92_Australia_Japan_India.pdf>.

LOSC.¹²² Moreover, China is India's largest trading partner, and with bilateral trade between the two States reaching US\$70.25 billion in 2014,¹²³ it is unlikely that India and China will oppose each other's interests directly, particularly in the South China Sea. Thus far, India's policy in the region could best be described as "incremental balancing", a term which David Scott has coined.¹²⁴ However, as the South China Sea is critical for India's trade ties with Southeast Asian States, as well as with Japan and South Korea, if China's pattern of aggressive behaviour persists, it is possible that India will join the United States, Japan and Australia in preserving the freedom of navigation in the region.

3.3.4 Australia

As a heavily trade-dependent State, maritime security and the freedom of navigation are vitally important to Australia's national interests. With approximately 54 per cent of its trade passing through the South China Sea, Australia has a definite stake in this maritime region.¹²⁵ China is Australia's largest trading partner, with a two-way trade value of AUD\$152.5 billion in 2014. ASEAN trade ranks second to China, with a two-way trade value of AUD\$101.6 billion in the same financial year.¹²⁶ Although

¹²² When India ratified the LOSC, it made a statement that "The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State."; See Declaration made upon ratification by India on 29 June 1995: *Declarations and Statements* (29 October 2013) Oceans and the Law of the Sea

<http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

¹²³ *Economic and Trade Relations* (31 May 2015) Embassy of India, Beijing, China

<<http://www.indianembassy.org.cn/DynamicContent.aspx?MenuId=97&SubMenuId=0>>.

¹²⁴ David Scott, *India's Incremental Balancing in the South China Sea* (26 July 2015) E-International Relations <<http://www.e-ir.info/2015/07/26/indias-incremental-balancing-in-the-south-china-sea/>>.

¹²⁵ See Michale Wesley, *Australia's interests in the South China Sea* (20/12/2015) Australian National University <<http://nsc.anu.edu.au/documents/occasional-5-brief-9.pdf>>.

¹²⁶ Edmund Tang, *Economic integration with Asia leads Australia's total trade to exceed A\$660 billion* (10 July 2015) Australian Trade and Investment Commission <<http://www.austrade.gov.au/about-austrade/economics-at-austrade/economic-integration-with-the-asia-leads-australias-total-trade-to-exceed-a-660-billion>>.

Australia avoids offending China, it actively supports ASEAN in advocating for a Code of Conduct in the South China Sea. Therefore, it appears Australia has a keen desire to keep ASEAN countries on side.¹²⁷ In addition, Australia and the United States are treaty allies by virtue of the ANZUS Treaty.¹²⁸ As Chris Rahman has commented: “The ANZUS alliance is the unalterable cornerstone of Australia’s defence and foreign policies.”¹²⁹ Even though the United States professes not to take sides in sovereignty disputes in the South China Sea, clashes over the freedom of navigation (especially military activities in the South China Sea), together with its commitment to the Philippines under the Security Treaty, could draw the United States into a conflict. If the United States became involved in a maritime conflict in the South China Sea, it is likely that Australia would follow through with its alliance obligations.¹³⁰ Moreover, Australia’s security partnerships with Malaysia and Indonesia, and its participation in the Five Power Defence Arrangements (FPDA) also involving Singapore, the United Kingdom, Malaysia and New Zealand, would require Australia to provide diplomatic support at the very least in the event of a conflict in the region involving one of its FPDA partners.¹³¹

Moreover, like the United States, maintaining the freedoms of navigation and overflight in the South China Sea is important to Australia. The Australia-United States Ministerial Consultations (AUSMIN) 2015 Joint Statement “emphasized the importance of the rights, freedoms, and lawful uses of the sea enjoyed by all states to fly, sail, and

¹²⁷ Wesley, above n 125.

¹²⁸ The ANZUS Treaty was signed by the United States, Australia and New Zealand on 1 September 1951, and entered into force on 29 April 1952. The full text of the ANZUS Treaty is available at *ANZUS Treaty – Full Text* (1 September 1951) Australianpolitics <<http://australianpolitics.com/1951/09/01/anzus-treaty-text.html>>.

¹²⁹ Chris Rahman, ‘Strategic Trends in the South China Sea/the East Sea and East Asia’s Security Architecture: The View from Australia’ (2014) 31(December) *International Studies* 111, 119.

¹³⁰ Wesley, above n 125, 149.

¹³¹ Rahman, above n 129, 121.

operate in accordance with international law.”¹³² The Australian Defence White Paper 2013 highlighted that:

Australia has interests in the peaceful resolution of territorial and maritime disputes including in the South China Sea in accordance with international law, the prevention of aggression within Southeast Asia, and freedom of navigation and maritime security in the region’s sea lanes.¹³³

These sentiments were echoed in the Australian Defence White Paper 2016, which stated that “Australia has a strong interest in the maintenance of peace and stability, respect for international law, unimpeded trade and freedom of navigation and overflight.”¹³⁴

Lastly, as many regional States rely heavily on seafood, the collapse of marine ecosystems in the South China Sea due to accelerated land reclamations and overfishing could make Australian waters the new target for regional fishing fleets, negatively impacting Australian fish stocks and the State’s fisheries stakeholders.

While the United States “will continue to be Australia’s most important strategic partner”, Australia is also engaging China, though with an acknowledgment that the strategic interests of the two States “may differ in relation to some regional and global security issues.”¹³⁵ Australia does not take sides in the South China Sea disputes, although it “opposes the use of artificial structures in the South China Sea for military purposes”¹³⁶, supports international rule-based orders, and supports the ASEAN-led regional security architecture.

¹³² 2015 Australia-United States Ministerial (AUSMIN) Joint Statement (13 October 2015) U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2015/10/248170.htm>>.

¹³³ *Defence White Paper 2013* (Australian Department of Defence, 2013), 25.

¹³⁴ *Defence White Paper 2016* (Australian Department of Defence, 2016), 57.

¹³⁵ *Ibid.*, 44.

¹³⁶ *Ibid.*, 57-58.

3.4 The Arbitral Tribunal's ruling and strategic implications for the South China Sea

One of the most important findings of the arbitral tribunal in the Philippines-China arbitration is that China has no legal basis to claim historic rights to resources within the nine-dash line.¹³⁷ Indeed, despite being unenforceable, the arbitral tribunal's ruling is legally binding on all parties involved in the proceedings.¹³⁸ The second key ruling of the arbitral tribunal is that none of the land features in the Spratly Islands, individually or collectively, are entitled to claim an EEZ or a continental shelf.¹³⁹ These two rulings, when taken together, clearly reduce the maritime zones which can be claimed by South China Sea claimant States. Moreover, as none of the land features in the Spratly Islands can generate an EEZ or continental shelf, it could be argued that none of the land features in the Paracel Islands (which are remarkably similar to those in the Spratly Islands), are capable of generating the relevant maritime zones. In addition, by dangerously operating law enforcement vessels and creating a serious risk of collision at sea, the arbitral tribunal ruled that China had violated the navigational safety provisions of the LOSC and other treaty provisions on maritime safety, particularly the International Regulations for Preventing Collisions at Sea (COLREGs).¹⁴⁰ As many incidents in the South China Sea have involved Chinese law enforcement vessels, this ruling represents a stern warning to China regarding its increasingly dangerous and aggressive behaviour. The arbitral tribunal's ruling also has the effect of undermining China's posture of strategic ambiguity in the South China Sea, with the decision

¹³⁷ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [278].

¹³⁸ LOSC, Annex VII, art 11; see also Bateman et al, above n 62, 1.

¹³⁹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [646].

¹⁴⁰ *Ibid* [1109].

unequivocally concluding that China can only claim maritime zones in accordance with the LOSC, not “relevant waters” based on so-called “historic rights”.

As a result of the arbitral tribunal’s award, China must choose whether it will respect the ruling and change its South China Sea policy, or whether it will continue to assert its maritime claims in contravention of the ruling, thus risking damage to its international reputation. On 13 July 2016, one day after the arbitral tribunal’s award, China released a White Paper titled *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*. This document states that “China’s territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China does not accept or recognize those awards. China opposes and will never accept any claim or action based on those awards.”¹⁴¹ In light of these perfervid comments, it is highly unlikely that China will show any respect for the arbitral tribunal’s decision. Clive Schofield has expressed the view that China may respond to the award with “an intensification of [its] island-building campaign in new locations and an increase in enforcement actions within the nine-dash line.”¹⁴² If this is the case, then the number of maritime incidents in the South China Sea is likely to increase.

For ASEAN, the arbitral tribunal’s decision has implications for the unity of the organisation. ASEAN has always called for the resolution of South China Sea disputes by peaceful means and in accordance with international law, particularly the LOSC. This suggests that ASEAN should respect the arbitral tribunal’s decision. However, as

¹⁴¹ *Full Text: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (13 July 2016) Xinhuanet <http://news.xinhuanet.com/english/china/2016-07/13/c_135509153.htm>.

¹⁴² Clive Schofield, *Explainer: what are the legal implications of the South China Sea ruling?* (13 July 2016) Conversation <<http://theconversation.com/explainer-what-are-the-legal-implications-of-the-south-china-sea-ruling-62421>>.

mentioned above, at this year's ASEAN Foreign Ministerial Meeting in Laos, ASEAN failed to refer to the South China Sea diplomatic and legal processes in its joint statement due to an objection from Cambodia. Indeed, ASEAN's consensus policy means that one member can block the decision of the whole organisation. For this reason, ASEAN may need to reconsider its voting process or risk losing its credibility when dealing with regional security issues.

The arbitral tribunal's ruling has also opened up opportunities for maritime user States to intensify freedom of navigation operations in the South China Sea. The United States, Japan, India and Australia have all expressed their support for the ruling.¹⁴³ But who has power to enforce this ruling? It is clear that the United States cannot enforce the ruling, but an international coalition could play an important role in managing China's behaviour. Now that the arbitral award has been handed down, it is quite possible that more operational assertions will be conducted in the South China Sea by like-minded States including the United States, Australia, India and Japan.¹⁴⁴ Smaller littoral States including Vietnam, Malaysia, Indonesia, Brunei and the Philippines will continue to strengthen their maritime capabilities while forging security and strategic partnerships with major external players to challenge China's authority in the region. With the nine-dash line being legally defunct, Indonesia is likely to be more assertive in protecting its maritime resources within its EEZ, especially around Natuna Island.¹⁴⁵ Meanwhile, Vietnam may consider mounting a legal challenge if China continues to

¹⁴³ See *Indian, US Urge China to Respect South China Sea Ruling* (1 September 2016) Indian Express <<http://www.newindianexpress.com/nation/India-US-urge-China-to-respect-South-China-Sea-ruling/2016/09/01/article3606423.ece>>; see also Levi A So, *World leaders react to South China Sea ruling* (13 July 2016) Philstar <<http://www.philstar.com/headlines/2016/07/13/1602416/world-leaders-react-south-china-sea-ruling>>.

¹⁴⁴ Mandhana, Niharika, *U.S., India, Japan Plan Joint Naval Exercises Near South China Sea* (3 March 2016) Wall Street Journal <<http://www.wsj.com/articles/u-s-india-japan-plan-joint-naval-exercises-near-south-china-sea-1457010828>>.

¹⁴⁵ Bateman et al, above n 62, 7.

violate its claimed EEZ in the South China Sea.¹⁴⁶ So although the arbitral tribunal went to considerable lengths to consider the arguments before issuing its landmark ruling, its award will not necessarily assist in reducing tensions in the South China Sea.

3.5 Conclusion

Due to the long-standing maritime disputes, tensions continue to rise with no signs of abatement. As the asymmetrical military balance between China and smaller littoral States continues to grow, so too does the involvement of external players, adding further complexity to the region's strategic context. If the arbitral tribunal's ruling in the Philippines-China arbitration is respected, the number of disputed maritime areas in the South China Sea would be reduced. However, to date, there have been no signs that China is willing to enter into any sort of compromise arrangement with regard to its maritime claims in the region. Accordingly, the risk of maritime incidents in the South China Sea, especially between military and law enforcement vessels and aircraft of the parties involved, will continue to grow. Unfortunately, the ultimate result of this situation is that navigating the shoals of the South China Sea will become increasingly precarious for sovereign immune vessels and aircraft.

¹⁴⁶ For example, Tran Cong Truc, former head of Vietnam's Border Affairs Committee, has suggested that Vietnam may bring arbitration proceedings against China over maritime zones which China is generating from the Paracel Islands, as well as China's persistent abuse of Vietnamese fishermen in disputed waters of the South China Sea, cited in Shawn W. Crispin, *Will Vietnam File a South China Sea Case Against China?* (3 August 2016) Diplomat <<http://thediplomat.com/2016/08/will-vietnam-file-a-south-china-sea-case-against-china/>>.

4 INTERNATIONAL LAW PRINCIPLES APPLICABLE TO THE PASSAGE OF SOVEREIGN IMMUNE VESSELS AND AIRCRAFT

4.1 Introduction

Navigation rights and maritime safety have been key areas of discussion throughout the development of the international law of the sea. While coastal States have sought greater control of waters along their coastlines, the priority of maritime States has been to maintain the status of water spaces within which the freedom of navigation can be exercised. Since the 17th century, these conflicting interests have been debated by many scholars, among them Hugo Grotius and John Selden. In April 1609, Grotius published *Mare Liberum* and proclaimed the freedom of the seas doctrine, thereby allowing the Dutch to utilise international sea lanes for trade in the East Indies.¹ By that time, the freedom of the seas doctrine posed a threat to Great Britain, which sought to control the seas around its territory. In 1635 the English author Selden wrote *Mare Clausum*, rejecting Grotius's claim and asserting that the seas adjacent to the British coasts were under British control.² To balance the competing interests of coastal States and maritime States, a number of international discussions took place during the 20th Century, the most significant being the three United Nations Conferences on the Law of the Sea conducted in 1958, 1960 and 1973. As a result, the United Nations Convention on the Law of the Sea (LOSC) was finally adopted in 1982 and entered into force in 1994. The LOSC establishes a legal framework which governs all uses of the oceans. In addition to the LOSC, several other international conventions governing navigation and overflight at sea have been established. These include the Convention on International Regulations for Preventing Collisions at Sea 1972, the International

¹ R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 1999) 4.

² Brian R Opeskin, 'The Law of the Sea' in Sam Blay, Ryszard Piotrowicz and B Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (Oxford University Press, 1997) 325.

Convention for the Safety of Life at Sea 1974, as well as The Convention on International Civil Aviation 1944. All of these conventions have provisions governing the passage of sovereign immune vessels and aircraft.

This chapter introduces the concept of sovereign immune vessels and aircraft under international law. It also analyses international law principles applicable to the passage of vessels and aircraft of this type in various maritime jurisdictional zones designated by the LOSC.

4.2 The concept of sovereign immune vessels and aircraft under international law

4.2.1 Principle of sovereign immunity

Sovereign immunity has long been accepted as a principle of customary international law. In essence, the principle holds that one sovereign State cannot be subject to the jurisdiction of another State. Under article 2(1) of the Charter of the United Nations, all states enjoy sovereign equality.³ The principle of sovereign equality recognises that the official representatives of one State should not be subject to the jurisdiction of another State.⁴ Although sovereign immunity is an internationally recognised doctrine, States have different views regarding the circumstances in which such immunity can be invoked. Currently, there are two divergent approaches to the doctrine of sovereign immunity: the absolute immunity doctrine and the restrictive immunity doctrine. Under the absolutist approach, foreign States enjoy absolute immunity from suit; by contrast, under the restrictive approach, foreign States are

³ United Nations, *Charter of the United Nations* <<http://www.un.org/en/documents/charter/chapter1.shtml>>.

⁴ Robert Beckman and Dagmar Butte, *Introduction to International Law* (20 April 2014) International Law Students Association <<http://www.ilsa.org/jessup/intlawintro.pdf>>.

granted immunity for their governmental acts but not their commercial activities.⁵ In 2004, the United Nations enacted the Convention on Jurisdictional Immunities of States and their Property, with an effort to provide a comprehensive approach to the issue of sovereign immunity. However, the Convention has not yet entered into force due to a lack of ratification.⁶ As a result, the doctrine of sovereign immunity continues to derive from customary international law.

4.2.2 The concept of sovereign immune vessels and aircraft under international law

There is no particular treaty definition for sovereign immune vessels and aircraft. However, international law has provisions regarding the passage of sovereign immune vessels and aircraft in different maritime jurisdictional zones. These provisions are chiefly found in the LOSC⁷ and The Convention on International Civil Aviation (Chicago Convention).⁸

Article 29 of the LOSC defines a warship as:

...a ship belonging to the armed forces of a State bearing the external marks distinguishing such ship of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.⁹

⁵ James E Berger and Charlene Sun, 'Sovereign Immunity: A Venerable Concept in Transition?' (2011) 27(2) *International Litigation Quarterly* 11,1.

⁶ The Convention should enter into force after receiving 30 instruments of ratification, acceptance, approval or accession. Thus there are only 28 signatories and 16 parties to the Convention; see *United Nation Convention on Jurisdictional Immunity of States and Their Property*, adopted 2 December 2004.

⁷ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994) (hereafter LOSC).

⁸ Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947) (hereafter Chicago Convention).

⁹ LOSC, art 29.

Article 32 states that “...nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.”¹⁰ LOSC article 95 states that “Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”¹¹ Meanwhile, Article 96 makes it clear that:

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.¹²

Regarding environmental protection, LOSC article 236 states that:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.¹³

Article 3 of the 1944 Chicago Convention classifies aircraft used in military, customs and police services as state aircraft and therefore not subject to the provisions of the Convention.¹⁴

For the purpose of this research, *sovereign immune vessels and aircraft are all vessels and aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.*

¹⁰ LOSC, art 32.

¹¹ LOSC, art 95.

¹² LOSC, art 96.

¹³ LOSC, art 236.

¹⁴ Chicago Convention, art 3.

4.3 International law principles applicable to the passage of sovereign immune vessels and aircraft at sea

4.3.1 The Law of the Sea Convention

Throughout the development of the international law of the sea, navigational issues have featured prominently in discussions. Apart from the new regime of deep seabed mining and the protection and preservation of the marine environment, most of the provisions of the LOSC directly or indirectly address the issue of freedom of navigation and other internationally lawful uses of the sea related to navigation.¹⁵ Although the LOSC is widely regarded as the “Constitution for the Oceans”, the passage of sovereign immune vessels and aircraft is not clearly addressed in the document. Indeed, there have been divergent interpretations among State Parties to the LOSC regarding the passage of these types of vessels and aircraft through different areas of ocean space. The following section will analyse the provisions of the LOSC applicable to the passage of sovereign immune vessels and aircraft in various maritime jurisdictional zones.

4.3.1.1 Internal Waters

Internal waters are those waters which lie landward of the baseline from which the territorial sea and other maritime zones are measured.¹⁶ There are two systems of baseline - the normal baseline, which is the low-water line along the coast of the coastal State, and the straight baseline, which is determined in accordance with articles 7, 9 and 10 of the LOSC.¹⁷ Coastal States enjoy sovereignty over their internal waters as well as the airspace above and the seabed and subsoil below.¹⁸ It has long been internationally

¹⁵ Thomas A Mensah, 'Foreward' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) Viii.

¹⁶ LOSC, art 8.

¹⁷ LOSC, art 5, 7, 9 & 10.

¹⁸ LOSC, art 2.

accepted that coastal States are, in principle, free to regulate activities in their internal waters as they are with regard to activities on their land territory.¹⁹ Internal waters, therefore, have not been the subject of detailed regulation under international law.²⁰ During the Third United Nations Conference on the Law of the Sea (UNCLOS III), Indonesia and the Philippines claimed that all waters which fell within the limits of archipelagic baselines were internal waters.²¹ Pursuant to these claims, which had no precedent in international law, vast areas of waters would have become internal waters. Indeed, this issue became the subject of a compromise arrangement during UNCLOS III, with the recognition of a regime of archipelagic waters within the archipelagic baselines of archipelagic States. Within their archipelagic waters, archipelagic States (including Indonesia and the Philippines) may draw closing lines across river mouths, bays and harbours on individual islands for the delimitation of internal waters in accordance with the normal rules on baselines, particularly articles 9, 10 and 11 of the LOSC.²²

Geographically, there are two types of internal waters: internal waters bound by the territorial sea of a coastal State, and internal waters bound by the archipelagic waters of an archipelagic State. Generally, a state may exercise complete and absolute sovereignty over its internal waters. However, there is one exception to this principle under LOSC article 8. According to this article, where the establishment of a straight baseline has the effect of enclosing as internal waters areas not previously considered as such, the right of innocent passage still exists in those waters.²³ So, for the purposes of

¹⁹ Churchill and Lowe, above n 1, 61.

²⁰ Ibid.

²¹ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing Ltd, 2010) 53.

²² LOSC, art 50; Churchill and Lowe, above n 1, 125.

²³ LOSC, art 8.

navigational regimes, there are two categories of internal waters. The first category is internal waters in which the coastal State enjoys absolute sovereignty, and the second category is internal waters in which foreign ships have the right of innocent passage to the same extent as in the territorial sea.

By entering the internal waters of a coastal State, ships put themselves under the territorial jurisdiction of that State.²⁴ Therefore, foreign ships within the internal waters of a coastal State are subject to the criminal and civil laws and regulations of that State. However, warships and other government ships operated for non-commercial purposes (hereafter sovereign immune vessels), enjoy sovereign immunity, and thus the laws of the coastal State may not be directly enforced against these vessels when they are in the internal waters of a particular coastal State.²⁵ It is important to note, however, that as sovereign immune vessels require permission from coastal States to enter their internal waters, such vessels normally comply with the conditions imposed by the coastal State granting admittance.²⁶ If, however, sovereign immune vessels violate the law and regulations of the coastal State resulting in loss or damage to the coastal state, the flag States of those vessels will bear international responsibility.²⁷

4.3.1.2 Territorial Sea

Under the LOSC, every coastal State has the right to establish its territorial sea up to a limit not exceeding 12 nautical miles measured from its baselines.²⁸ Coastal States exercise sovereignty over their territorial sea subject to the exercise of innocent passage by foreign vessels. Article 17 of the LOSC states that: "...ships of all States,

²⁴ Churchill and Lowe, above n 1, 65.

²⁵ LOSC, art 32.

²⁶ V D Degan, 'Internal Waters' (1986) 17 *Netherlands Yearbook of International Law* 3, 28.

²⁷ LOSC, art 31.

²⁸ LOSC, art 3.

whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”²⁹ Two key terms – “passage” and “innocent” – are fundamental to the definition of innocent passage. Article 18 of the LOSC defines the regime of passage as:

1. ...navigation through the territorial sea for the purpose of:
 - a. Traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
 - b. Proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.³⁰

Article 19(1) defines passage to be innocent “... so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”³¹ Article 19(2) lists activities which, if engaged in by a vessel in the territorial sea, would be considered non-innocent. These include:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

²⁹ LOSC art 17.

³⁰ LOSC, art 18.

³¹ LOSC, art 19.

- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.³²

Article 21 gives coastal States the right to enact laws and regulations relating to innocent passage, provided such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships “unless they are giving effect to generally accepted international rules or standards.”³³ Articles 24(1a) and 211(4) of the LOSC prevent coastal States from adopting regulations that have the effect of denying or impairing the innocent passage of foreign ships through the territorial sea.³⁴ For the safety of navigation, coastal States may designate sea lanes and traffic separation schemes for foreign ships engaging in innocent passage through their territorial sea.³⁵ For reasons essential for the protection of their security, coastal States may suspend temporarily the innocent passage of foreign vessels in specified areas of their territorial

³² LOSC, art 19.

³³ LOSC art 21.

³⁴ LOSC, arts 24 & 214.

³⁵ LOSC, art 22.

sea after duly publishing the suspension.³⁶ Article 25 of the LOSC states that: “The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”³⁷ However, if a foreign vessel does not comply with the coastal State’s laws and regulations during passage, it is unclear whether or not such passage immediately becomes non-innocent, thus allowing the coastal State to invoke the protective rights under article 25.³⁸ It is also unclear how the coastal State may deal with vessels exercising non-innocent passage in its territorial sea. In practice, issuing a verbal warning, preventing vessels from proceeding, firing warning shots, boarding vessels or “bumping off” are commonly used methods.³⁹

The LOSC contains no specific provision regarding the innocent passage of warships. With regard to modes of navigation, article 20 stipulates that “submarine and other underwater vehicles are required to navigate on the surface and show their flags.”⁴⁰ Article 30 states that if a foreign warship passing through the territorial sea does not comply with the laws and regulations of the coastal State, then the coastal State may require it to leave the territorial sea immediately.⁴¹ There are no provisions in the LOSC requiring foreign warships exercising the right of innocent passage in the territorial sea to give prior notification to, or seek prior authorisation from, the coastal state. Indeed, UNCLOS III attempted to settle these issues, with a particular focus on whether warships enjoy the doctrine of innocent passage or require prior notification or

³⁶ LOSC, art 25.

³⁷ LOSC, art 25.

³⁸ Donald R Rothwell, 'Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) 79.

³⁹ Ibid 76.

⁴⁰ LOSC, arts 19 & 20.

⁴¹ LOSC, art 30.

authorisation from the coastal State.⁴² However, due to the disagreement between coastal States and maritime powers at UNCLOS III, the final text of the LOSC does not address this issue.⁴³

Three different interpretations have emerged regarding the innocent passage of warships. The first interpretation is that “warships enjoy a right of innocent passage which may be exercised in the same manner as merchant ships.”⁴⁴ This interpretation is based on the text of LOSC article 17 which states that “Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”⁴⁵ Article 17, which appears under the heading “Rules applicable to all ships”, could be read as implying that warships are entitled to exercise the right of innocent passage. This interpretation is also supported by the decision of the International Court of Justice (ICJ) in the *Corfu Channel Case*, which involved the passage of four British warships through the Corfu Channel in 1946.⁴⁶ In this case, the ICJ ruled that:

It is...generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an

⁴² Thomas Windsor, 'Innocent passage of warships in East Asian territorial seas' (2011) 3(3) *Australian Journal of Maritime and Oceans Affairs* 73, 73.

⁴³ Ibid.

⁴⁴ Rothwell and Stephens, above n 21, 268; see also Erik Jaap Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff Publishers, 2000) 27.

⁴⁵ LOSC, art 17.

⁴⁶ See *Corfu Channel* ((*United Kingdom of Great Britain and Northern Ireland v. Albania*) International Course of Justice <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=5>>; see also Stuart Kaye, *Freedom of Navigation in Indo-Pacific Region*, Papers in Australian Maritime Affairs No 22 (Sea Power Centre, 2008), 6.

international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁴⁷

Even though the Corfu Channel is a strait which overlaps with Albania's territorial sea (rather than merely constituting territorial waters), and the case itself precedes the LOSC, the ICJ decision provides support for the right of innocent passage of warships.⁴⁸ In 1989 the United States and the former Soviet Union – the two major maritime powers at the time – reached an agreement titled *Uniform Interpretation of Norms of International Law Governing Innocent Passage*. The Joint-Statement provides that:

All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.⁴⁹

This view is supported by other maritime powers including Germany, Italy and the Netherlands.⁵⁰ The U.S. Navy has also been exercising the right of innocent passage of warships as part of its freedom of navigation program since 1979.⁵¹

The second interpretation is that in the light of the provisions of LOSC articles 19 and 25 (which concern the “Meaning of Innocent Passage” and the “Rights of Protection of the Coastal State” respectively), coastal States have the right to take measures to safeguard their security interests, including requiring foreign warships to obtain prior authorisation when seeking to exercise the right of innocent passage

⁴⁷ Corfu Channel case Judgement of April 9th, 1949: ICJ Rep 4, 28.

⁴⁸ Windsor, above n 42, 75.

⁴⁹ *Joint Statement by the United States of America and the Union of Soviet Socialist Republics* <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bule14.pdf>.

⁵⁰ See Declarations by Germany (1994), Italy (1995), and the Netherlands (1996) at *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter*

<http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

⁵¹ Dennis Mandsager, 'The U.S. Freedom of Navigation Program: Policy, Procedure, and Future' in Michael N. Schmitt (ed), *The Law of Military Operations* (Naval War College Press, 1998) 115.

through their territorial sea.⁵² Some authors support this view by differentiating the terms used in the relevant articles of the LOSC. They suggest that in article 38 (Right of Transit Passage) and article 53 (Right of Archipelagic Sea Lanes Passage), the term used is “all ships”, while in article 17 (Right of Innocent Passage), the term used is “ships”.⁵³ This has led Jin to assert that: “If the former term is intended to cover ships of all types, the latter can only mean vessels *other than* warships.”⁵⁴ According to some scholars, there are at least 40 States which have made the passage of foreign warships in their territorial seas contingent on certain requirements being met - such as the need for prior authorisation or notification in accordance with their national laws and regulations.⁵⁵

The third interpretation is that since the LOSC has no provisions specifically regarding the innocent passage of warships, the question should be governed by customary law as affirmed in the Preamble to the LOSC. Indeed, the Preamble explicitly states that “...matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”⁵⁶ However, the doctrine of innocent passage for warships has long been one of the most contentious and controversial issues in international law. Not a single written agreement exists on the issue, and there has been a lack of uniformity in State practice over the past 100 years.⁵⁷ Of the 23 States involved in addressing this issue at the 1930 Hague Codification Conference, four favoured the requirement of prior notification or authorisation, 15

⁵² See Declarations by Iran (1982), Romani (1996), Oman (1983), Algeria (1984), Bangladesh (2001), China (1996) at *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter*, above n 50.

⁵³ Shao Jin, 'The question of innocent passage of warships after UNCLOS III' (1989) (January) *Marine Policy*, 58.

⁵⁴ Ibid.

⁵⁵ Ibid 66; see Zou Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice' (1998) 29 *Ocean Development & International Law* 195, 206; see also Kaye, above n 46, 8.

⁵⁶ LOSC, Preamble; see also Jin, above n 53, 61.

⁵⁷ Ibid 62.

were prepared to allow the innocent passage of warships without special formalities, and one State considered the issue to be controversial in light of existing international law.⁵⁸ Due to the different views expressed on this topic, the conference failed to produce a convention on the territorial sea (among other issues). When the International Law Commission of the United Nations (ILC) was asked to prepare a draft for the Law of the Sea Convention by UN member States, Article 26 of its 1954 draft provided that: “Save exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.”⁵⁹ However, two years later, in its commentary on the articles concerning the Law of the Sea, the ILC stated that:

The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18.⁶⁰

This provision was not adopted at the first United Nations Conference on the Law of the Sea (UNCLOS I). Indeed, as States have adopted different positions on the question of innocent passage of warships, their practices have been far from uniform.⁶¹ Moreover, the divergence of opinion between maritime powers and developing States on this topic continued to UNCLOS III. Ultimately, however, the failure of states to reach consensus on this issue led to the LOSC being silent on the innocent passage of warships.

⁵⁸ Ibid.

⁵⁹ *Yearbook of International Law Commission 1954* (United Nations, 1960) 161.

⁶⁰ *Yearbook of International Law Commission 1956* (United Nations, 1957) 276.

⁶¹ Keyuan, above n 55, 198.

More concerning, however, is that the divergence of state practice in the area, coupled with a lack of judicial decisions, makes the formation of a universal customary law rule on the innocent passage of warships extremely unlikely.

In summary, there exists three different interpretations of the regime of innocent passage for warships. However, the second interpretation is rather weak because, in general, the use of the term “ships” instead of “all ships” does not have the effect of excluding warships. In addition, as the right of innocent passage was established with the intention of balancing the interests of coastal States and maritime States, if the coastal States restrict the innocent passage of warships through their territorial seas, the notion of balancing competing interests becomes somewhat obsolete. The third interpretation is quite neutral, and thus does little to resolve the issue. Moreover, this interpretation could result in States implementing the right of innocent passage differently – a consequence which militates against the very intention of the LOSC. The first interpretation is widely supported by a majority of States and by the text of the Convention itself. It is also worth noting that, at the final session of the meeting of UNCLOS III in December 1982, Professor Tommy Koh, the president of UNCLOS III, made the following pronouncement:

I think the convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State.⁶²

Even so, this statement is hardly authoritative, being only the personal view of the president of UNCLOS III at a discrete point in time.

⁶² Quoted in J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims* (Martinus Nijhoff 2012) 242.

In summary, the territorial sea is subject to the sovereignty of coastal States. Ships of other States have the right of innocent passage through the territorial sea. However, the passage of warships through the territorial sea of a coastal State has long been a controversial issue - both in legal doctrine and as a matter of state practice. The LOSC does not contain any provision expressly prohibiting or allowing warships the right of innocent passage. In addition, State practice has failed to elucidate the issue, with no uniform approach existing among States. This divergence of state practice, combined with a lack of judicial decisions on the matter, makes the formation of universal customary law rule on the innocent passage of warships very unlikely. What is clear is that the right of innocent passage does *not* apply to foreign aircraft. Indeed, this principle has international appeal, and is expressly recognised in the Chicago Convention.

4.3.1.3 Straits used for International Navigation

The term “strait” has never been defined in any international convention, including the LOSC. The International Hydrographic Organization defines a “strait” as “a passage connecting two larger bodies of water.”⁶³ The LOSC devotes considerable attention to the legal regime of waters constituting a strait rather than the definition of a strait as such.⁶⁴ Under the LOSC, there are different legal regimes applying to each category of strait. These include: (i) straits through which there is a high seas route or a route through an EEZ of similar convenience with respect to navigational and hydrographical characteristics;⁶⁵ (ii) straits formed by an island of a State bordering the strait and its mainland where there exists seaward of the island a route of similar convenience with

⁶³ International Hydrographic Organization, *Hydrographic Dictionary* (International Hydrographic Organization, Fifth ed, 1994) 232.

⁶⁴ Churchill and Lowe, above n 1, 102.

⁶⁵ LOSC, art 36.

respect to its navigational and hydrographical characteristics;⁶⁶ (iii) straits connecting a part of the high seas or an EEZ with the territorial sea of a foreign State;⁶⁷ (iv) straits governed by long-standing special conventions;⁶⁸ and (v) straits connecting one part of the high seas or an EEZ and another part of the high seas or an EEZ.⁶⁹

In the case of a strait through which there is a high seas route or a route through an EEZ of similar convenience with respect to its navigational and hydrographical characteristics, the regime of innocent passage will apply to those parts of the strait which lie within the territorial sea limits of States bordering the strait. Conversely, the regime of freedom of navigation will apply on the high seas and in the EEZ to those waters outside the territorial seas of bordering States.⁷⁰ Theoretically, this type of strait should be broader than 24 nautical miles. The Strait of Florida between the United States and Cuba is one such example.⁷¹

Within straits formed by an island of a State bordering the strait and its mainland, and where there exists seaward of the island a route of similar convenience with respect to its navigational and hydrographical characteristics, ships of all States enjoy the right of innocent passage without suspension and there is no right of innocent passage for aircraft.⁷² The Strait of Messina (Italy), the Pemba Channel (Tanzania), and Hainan Strait (China) are examples of these types of straits.⁷³

In the case of those straits which connect a part of the high seas or an EEZ with the territorial sea of a foreign State, the regime of non-suspendable innocent passage will

⁶⁶ LOSC, art 38.

⁶⁷ LOSC, art 45.

⁶⁸ LOSC, art 35.

⁶⁹ LOSC, art 37.

⁷⁰ LOSC, art 36; see Churchill and Lowe, above n 1, 105; see also Abdul Ghafur Hamid, 'Legal Regime of Straits used for International Navigation' (Paper presented at the IDFR Maritime Seminar Series-Straits of Malacca, Kuala Lumpur, 10 November 2009), 14-15.

⁷¹ Churchill and Lowe, above n 1, 105.

⁷² Rothwell and Stephens, above n 21, 238; LOSC art 45.

⁷³ Ibid 239.

apply.⁷⁴ The Strait of Tiran which connects the Red Sea with the territorial sea of Jordan and Israel is one such example.⁷⁵

For those straits which are regulated in whole or in part by long-standing special conventions referred to in LOSC article 35, the provisions of those conventions will apply. For instance, passage through the Turkish Straits (which comprise the Dardanelles connecting the Aegean Sea with the Sea of Marmara), as well as the Bosphorus (which connects the Sea of Marmara with the Black Sea), would be regulated by the Montreux Convention of 1936.⁷⁶

The last category comprises those Straits connecting one part of the high seas or an EEZ and another part of the high seas or an EEZ. Passage through this category of strait is regulated by the LOSC, under the regime of “Transit Passage.”⁷⁷ The LOSC states that the transit passage regime applies to Straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.⁷⁸

Article 38 of the LOSC states that “all ships and aircraft enjoy the right of transit passage...”⁷⁹ The LOSC also defines transit passage as:

...the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone...⁸⁰

⁷⁴ LOSC, art 45.

⁷⁵ See Churchill and Lowe, above n 19, 105; see also Ann Ellen Danseyar, 'Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty' (1982) 5(1) *Boston College International and Comparative Law Review* 127, 167.

⁷⁶ 1936 Convention Regarding the Regime of the Straits, adopted on 20 July 1936 (entered into force 9 Nov 1936); see also Rothwell and Stephens, above n 21, 244.

⁷⁷ LOSC, part III, section 2.

⁷⁸ LOSC, arts 37 & 38.

⁷⁹ LOSC, art 38.

⁸⁰ LOSC, art 38.

During transit passage, ships and aircraft shall “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait”, “refrain from any activities other than those incident to their normal modes of continuous and expeditious transit”, as well as comply with international safety regulations, procedures and practices such as the International Regulations for Preventing Collisions at Sea (COLREGS), the International Convention for the Safety of Life at Sea (SOLAS) and the Rules of the International Civil Aviation Organization.⁸¹ The words “normal modes” are significant for the transit of military vessels and aircraft. In the view of the United States, this term means that “submarines may pass through straits submerged, naval task forces may conduct formation steaming, aircraft carriers may engage in flight operations and military aircraft may transit unannounced and unchallenged.”⁸² This view, which is held by not only the United States but also other naval powers, has not been controversial in the Asia - Pacific region, and is consistent with the *travaux préparatoires* of UNCLOS III.⁸³

States bordering the strait may “designate sea lanes and prescribe traffic separation schemes”, as well as adopt laws and regulations relating to the safety of navigation, the prevention, reduction and control of pollution, the prevention of fishing, and other measures related to customs, fiscal, immigration or sanitary matters.⁸⁴ However, such laws and regulations shall not have the practical effect of denying, hampering or impairing the right of transit passage.⁸⁵ While a coastal State may temporarily suspend

⁸¹ LOSC, art 39.

⁸² Department of Defence (US) National Security and the Convention on the Law of the Sea (2nd, 1996) 5, cited by Sam Bateman, 'The Regime of Strait Transit Passage in the Asia Pacific: Political and Strategic Issues' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) 97.

⁸³ Sam Bateman, above n 82, 98; see also Churchill and Lowe, above n 1, 109.

⁸⁴ LOSC, arts 41 & 42.

⁸⁵ LOSC, art 42.

innocent passage, transit passage cannot be suspended by the strait State.⁸⁶ Marine scientific research and hydrographic survey activities during the transit passage of foreign ships are subject to the prior authorisation of those States bordering the strait.⁸⁷

According to LOSC article 38, warships and other sovereign immune vessels and aircraft enjoy the right of transit passage.⁸⁸ However, if a sovereign immune vessel or aircraft violates laws and regulations of States bordering the strait, then the flag State of the vessel or the State of registry of the aircraft shall bear international responsibility for any loss or damage to States bordering the strait.⁸⁹

4.3.1.4 Archipelagic Waters

The concept of archipelagic waters is relatively new in international law. The LOSC defines an archipelagic State as “a State constituted wholly by one or more archipelagos and may include other islands.”⁹⁰ An archipelago is defined as:

A group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.⁹¹

An archipelagic State may, in accordance with the provisions of the LOSC, draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago to proclaim the enclosed waters landward of these baselines as archipelagic waters.⁹² The sovereignty of an archipelagic State over its archipelagic waters extends to the air space above as well as the seabed and subsoil and

⁸⁶ LOSC, art 44.

⁸⁷ LOSC, art 40.

⁸⁸ LOSC, art 38.

⁸⁹ LOSC, art 42.

⁹⁰ LOSC, art 46.

⁹¹ LOSC, art 46.

⁹² LOSC, arts 47&48.

the resources contained therein.⁹³ It should be noted that only archipelagic States can draw straight archipelagic baselines. Thus, archipelagic baselines cannot be drawn around a group of islands belonging to a non-archipelagic coastal State.

Throughout archipelagic waters, ships of all States enjoy the right of innocent passage similar to the right of innocent passage in the territorial sea.⁹⁴ However, the LOSC also provides a more liberal passage right within designated archipelagic sea lanes in archipelagic waters. Article 53 of the LOSC defines archipelagic sea lanes passage as:

...the exercise in accordance with this Convention of the right of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁹⁵

The phrase “normal mode” can be interpreted as including all activities which are incidental to the ordinary navigation of vessels and aircraft exercising the passage. For instance, submarines are permitted to navigate underwater as their normal mode of navigation, while aircraft carriers may be used to launch and recover aircraft.⁹⁶ Unlike the regime of innocent passage, archipelagic sea lanes passage shall be continuous and expeditious, excluding calling at a port of an archipelagic State.⁹⁷ This means that if a vessel seeks to call at a port within the archipelagic waters of an archipelagic State, then

⁹³ LOSC, art 49.

⁹⁴ LOSC, art 52.

⁹⁵ LOSC, art 53.

⁹⁶ Hasjim Djalal, 'The Law of the Sea Convention and Navigational Freedoms' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) 6; see also Guidance for Ships Transiting Archipelagic Waters (IMO, SN/Circ.206).

⁹⁷ LOSC, art 53.

the innocent passage regime will apply to the passage of that vessel on its way to the port.⁹⁸

An archipelagic State may designate sea lanes within and air routes above these archipelagic sea lanes. However, “such sea lanes and air routes shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters.”⁹⁹ Where an archipelagic State does not designate sea lanes or air routes, ships and aircraft may exercise the right of archipelagic passage through the routes normally used for international navigation.¹⁰⁰ Aircraft only enjoy the right of archipelagic sea lane passage through the air routes above the sea lanes.¹⁰¹ Within archipelagic waters but outside the sea lanes, the innocent passage regime applies; hence, there is no passage right for aircraft over other parts of archipelagic waters without the consent of the archipelagic state. The new regime of archipelagic sea lanes passage is significant mainly for military aircraft, as civil aircraft normally use routes designated by the International Civil Aviation Organization rather than routes over archipelagic sea lanes.

Under LOSC article 53(5) the width of a designated sea lane may not be more than 50 nautical miles, and ships and aircraft are not permitted to navigate closer to the coast than ten per cent of the distance between the nearest points on islands bordering the sea lanes.¹⁰² In addition to the designation of archipelagic sea lanes, the archipelagic State may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in the sea lanes.¹⁰³ An archipelagic State may adopt laws and

⁹⁸ Rothwell and Stephens, above n 21, 251.

⁹⁹ LOSC, art 53.

¹⁰⁰ LOSC, art 53.

¹⁰¹ LOSC, art 53.

¹⁰² LOSC, art 53.

¹⁰³ LOSC, art 53.

regulations relating to the safety of navigation, the prevention, reduction and control of pollution, the prevention of fishing, as well as other measures related to customs, fiscal, immigration or sanitary matters. However, such laws and regulations shall not have the practical effect of denying, hampering or impairing the right of archipelagic sea lanes passage.¹⁰⁴ Although these sea lanes can be substituted in consultation with the relevant competent international organisation, the right of archipelagic sea lanes passage cannot be suspended.¹⁰⁵

All ships and aircraft, including sovereign immune vessels and aircraft, enjoy the right of archipelagic sea lanes passage.¹⁰⁶ Article 54 of the LOSC makes it clear that ships and aircraft exercising the right of archipelagic sea lanes passage are required to: (i) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the archipelagic State; and (ii) comply with generally accepted international regulations regarding safety at sea, marine environmental protection provisions and the Rules of Air established by the International Civil Aviation Organization. Maritime scientific research and hydrographic survey activities in the archipelagic sea lanes may only be conducted with the consent of the archipelagic State.¹⁰⁷ The regimes of archipelagic sea lanes passage and transit passage demonstrate similarities, as both represent continuous and expeditious forms of transit. However, differences do exist between the two regimes. Firstly, in exercising the right of archipelagic sea lanes passage, ships must stay within the designated sea lanes and not deviate more than 25 nautical miles on either side of the axis line and observe the ten per cent rule. By contrast, ships in transit passage are not required to stay within specific

¹⁰⁴ LOSC, arts 54 & 42.

¹⁰⁵ LOSC, arts 54 & 44.

¹⁰⁶ LOSC, art 53.

¹⁰⁷ LOSC, arts 54 & 40.

boundaries.¹⁰⁸ Secondly, a ship in transit passage may visit ports along the strait and still remain in transit passage. However, if a ship is seeking to call at a port of an archipelagic State, then the innocent passage regime rather than the archipelagic sea lanes passage regime will apply to the passage of that vessel on its way to port. In addition, the text of the LOSC uses the term “freedom of navigation” for the transit passage regime, while the phrase “right of navigation” is used in relation to the archipelagic sea lanes passage regime. Hasjim Djalal, an Indonesian author, views the different wording as a matter of principle. Indeed, Djalal has asserted that: “We have no difficulty in giving the right of navigation to people for traversing Indonesia sea lanes, but we would not be able to recognize that right as freedom of navigation.”¹⁰⁹ Thus, the regime of archipelagic sea lane passage is deemed to be more restrictive than the regime of transit passage.¹¹⁰

In summary, archipelagic sea lanes passage is a relatively new navigational legal regime introduced in the LOSC. It represents a compromise between the regime of innocent passage advocated by the archipelagic States and the regime of freedom of navigation advocated by maritime user States.¹¹¹

4.3.1.5 Exclusive Economic Zone

Like the regime of archipelagic sea lanes passage, the exclusive economic zone (EEZ) is one of the newer concepts to be introduced into the LOSC. Until the LOSC was adopted in 1982, all waters beyond the territorial seas of the coastal States were

¹⁰⁸ Robin Warner, 'Implementing the Archipelagic Regime in the International Maritime Organization' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff Publisher, 2000) 179.

¹⁰⁹ Hasjim Djalal, *Indonesia and the Law of the Sea* (Centre for Strategic and International Studies, 1995) 410.

¹¹⁰ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 35.

¹¹¹ Nugroho Wisnumurti, 'Indonesia and the Law of the Sea' in Choon-ho Park and Yae Kyu Park (eds), *The Law of the Sea: Problems from the East Asian Perspective* (Law of the Sea Institute, University of Hawaii, 1987) 395-96.

treated as high seas - an area where all States enjoyed the freedoms of navigation and overflight. However, before the LOSC, States could not reach an agreement on the breadth of the territorial sea. Some States claimed a breadth of 3 nautical miles (nm), others claimed 12 nm, and some Latin American and African States claimed territorial seas up to 200 nm.¹¹² The concept of the EEZ was first proposed by Kenya to the Asian-African Legal Consultative Committee in 1971, and to the United Nations Seabed Committee in 1972.¹¹³ This new concept of the EEZ was largely supported by most developing States and reflected the desire of such States to gain greater control over economic resources off their coasts.¹¹⁴ The concept of the EEZ also attracted the support of major maritime States, as it was a jurisdictional zone in which the high seas freedoms of navigation and overflight would be reserved (rather than being a sovereignty zone).¹¹⁵ During negotiations at UNCLOS III, there was considerable debate between developing States and maritime States over the legal regime of the EEZ. Developing States considered the EEZ to be a simple extension of national jurisdiction within which coastal States would enjoy sovereignty subject to certain limitations. Meanwhile, other maritime States viewed the EEZ as part of the high seas – an area where coastal States would have some rights over resources.¹¹⁶ The concept of the EEZ finally adopted at the LOSC represented a compromise between the varying positions.¹¹⁷ The EEZ zone is widely regarded as an innovation in the Law of the Sea. It is a separate functional zone

¹¹² See Kaye, above n 46, 3.

¹¹³ 'Kenya: Draft Articles on the Concept of an Exclusive Economic Zone beyond the Territorial Sea' (1972) 12(1) *International Legal Materials* 33; see also Churchill and Lowe, above n 19, 160.

¹¹⁴ Churchill and Lowe, above n 1, 160-61.

¹¹⁵ Rothwell and Stephens, above n 21, 83.

¹¹⁶ Sam Bateman, 'Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone' (2005) 144 *Maritime studies* 17, 17.

¹¹⁷ Churchill and Lowe, above n 1, 161.

of a *sui generis* character, with neither residual territorial sea characteristics nor residual high seas characteristics.¹¹⁸

Article 55 of the LOSC states that:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to a specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.¹¹⁹

The LOSC gives coastal States sovereign rights over living and non-living resources of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, as well as over activities related to economic exploration and exploitation of the zone, such as the production of energy from the water, current and wind.¹²⁰ The term “sovereign rights” was used instead of “sovereignty” in article 56 as the latter term could imply that the coastal State’s rights over the EEZ are exclusive, not preferential.¹²¹ Article 56 also makes it clear that coastal States have jurisdiction, as provided for in the relevant provisions of the Convention, with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, as well as the protection and preservation of the marine environment.¹²² This means that in the EEZ, the coastal State’s jurisdiction is limited to that “provided for in the relevant provisions” of the LOSC. In other respects, the regime of the high seas will apply. Moreover, in exercising its rights and performing its duties in the EEZ, the coastal State “shall have due regard

¹¹⁸ Ibid 165.

¹¹⁹ LOSC, art 55.

¹²⁰ LOSC, art 56.

¹²¹ Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (Paper presented at the Securing the Ocean for the Next Generation, Seoul, Korea, 21-24 May 2012), 7.

¹²² LOSC, art 56.

to the rights and duties of other States and shall act in a manner compatible with the provisions of [the] Convention.”¹²³

Article 58 of the LOSC gives all ships and aircraft the freedoms of navigation and overflight, as well as the freedom to lay submarine cables and pipelines referred to in Article 87 and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft [etc].”¹²⁴ However, in the exercise of their rights, user States “shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of [the] Convention and other rules of international law.”¹²⁵

The requirement that coastal and maritime States respect each other’s rights and duties is encompassed in the term “due regard” in Articles 56 and 58 of the LOSC. However, no definition exists for the term “due regard”. The text of the LOSC makes it clear that coastal States and maritime States shall have due regard to the *rights and duties* of each other, but there is no obligation on such States to have due regard to each other’s *interests*.¹²⁶ Therefore, other States are not expressly required to give due regard to, for example, the security interests of coastal States in the EEZ.¹²⁷

Article 59 provides a basis resolving conflicts regarding unattributed rights and jurisdiction in the EEZ. The article provides that:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict

¹²³ LOSC, art 56.

¹²⁴ LOSC, arts 58 & 87.

¹²⁵ LOSC, art 58.

¹²⁶ Beckman and Davenport, above n 121, 11.

¹²⁷ Ibid.

should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole.¹²⁸

This means that, in cases where the LOSC does not explicitly grant rights to coastal States or other States, there should be no presumption in favour of one over the other.¹²⁹ Article 59 also makes it clear that in determining each case of conflict, the “relevant circumstances” have to be taken into account.

In its attempt to balance the divergent interests of littoral States and extra-regional players in the EEZ, the LOSC is not free from ambiguity, especially with regard to military activities in the EEZ. The LOSC does not expressly state which types of military activities are permissible or prohibited in the EEZ of a foreign State. Coastal States have not been granted any specific authority to regulate foreign military activities in their EEZ, while no particular right has been granted to maritime user States regarding military activities. Some States took the step of making declarations upon their signature, ratification or accession to the LOSC requiring their consent regarding foreign military activities in their EEZ. These States include Brazil, Bangladesh, Malaysia, India, Pakistan and Cape Verde.¹³⁰ Other maritime States made declarations opposing these interpretations, among them the Netherlands, Germany and Italy.¹³¹ The LOSC allows States to make declarations or statements when signing, ratifying or acceding to the Convention; nevertheless, it does not permit reservations.¹³² Currently, this issue remains ambiguous and controversial with regard to state practice. Between 2002 and 2005, a group of second track participants from the Asia - Pacific region

¹²⁸ LOSC, art 59.

¹²⁹ Beckman and Davenport, above n 121, 12.

¹³⁰ See Declarations by Brazil (1988), Bangladesh (2001), Malaysia (1996), India (1995), Pakistan (1997) at above n 50.

¹³¹ Ibid; Sea Declarations by the Netherlands (1996), Germany (1994) and Italy (1995).

¹³² LOSC, arts 309 & 310.

participated in a series of meetings sponsored by the Ocean Policy Research Foundation (OPRF). These meetings focussed on the development of guidelines for navigation and overflight in the EEZ. EEZ Group 21 agreed that the LOSC is unclear and ambiguous regarding the regime of military activities in the EEZ.¹³³ In 2005, EEZ Group 21 proposed Guidelines for Navigation and Overflight in the Exclusive Economic Zone, which sought to “assist in balancing and clarifying the rights and duties of both coastal States and maritime user States, as well as certain terminology with regard to the activities that might be undertaken in an EEZ by foreign ships and aircraft.”¹³⁴ However, The Guidelines were not widely supported as they restrict unduly the freedoms of navigation and overflight available in an EEZ.¹³⁵ In 2013, OPRF reviewed and revised the Guidelines, and in doing so renamed them “Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific.”¹³⁶ Even so, the Principles have not garnered sufficient attention from regional States.

The controversy over military activities in the EEZ arises from different interpretations of LOSC provisions, particularly articles 58, 88, 300 and 301. It is unclear whether or not military activities are included in the freedoms of navigation and overflight and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft [etc]” set out in article 58. For instance, the United States view is that in a foreign EEZ, warships and military aircraft enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. Therefore, “the

¹³³ Mark J Valencia and Kazumine Akimoto, 'Guidelines for navigation and overflight in the exclusive economic zone' (2006) 30 *Maritime Policy* 704, 706.

¹³⁴ Ibid 707.

¹³⁵ Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific (Ocean Policy Research Foundation, 2013), 1.

¹³⁶ Ibid.

existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.”¹³⁷ By contrast, Brazil issued a declaration upon its signature to the LOSC on December 1982 which states that: “The Brazilian government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal State”.¹³⁸ Article 88 of the LOSC states that “the high seas shall be reserved for peaceful purposes,” and this statement also applies to the EEZ under article 58.¹³⁹ Some States argue that under the “peaceful purposes” provisions of the LOSC, at least some types of military activities in the EEZ may not be permitted.¹⁴⁰ Indeed, article 300 of the LOSC requires that:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.¹⁴¹

There are different views on whether certain types of military activities in the EEZ are a lawful exercise of the freedoms of navigation and overflight or an abuse of the rights of navigation and overflight.¹⁴² Article 301 of the LOSC reinforces the “peaceful purposes” of article 88 by requiring States to “refrain from any threat or use of force against the territorial integrity or political independence of any State”.¹⁴³ However, the term “peaceful purposes” used in the LOSC does not preclude all military

¹³⁷ *The Commander's Handbook on the Law of Naval Operations* (Department of Defense, The United States, 2007) 2-9.

¹³⁸ Sea Declaration by Brazil at above n 50.

¹³⁹ LOSC, arts 58 & 88.

¹⁴⁰ Valencia and Akimoto, above n 133, 706.

¹⁴¹ LOSC, art 300.

¹⁴² Bateman, above n 116, 22.

¹⁴³ LOSC, art 301.

activities.¹⁴⁴ It is also worth noting that the sovereign rights of coastal States in their EEZ, as specified in article 56 of the LOSC, are limited to the “waters superjacent to the seabed and of the seabed and its subsoil”, thereby excluding the airspace above the EEZ.¹⁴⁵ Indeed, nothing in LOSC “provides [a] legal basis for regulating military activities in the airspace above the EEZ.”¹⁴⁶ As airspace over the EEZ is not part of the EEZ, it has been proposed by some commentators that “all aircraft have freedom of overflight and, therefore, the right to conduct military operations.”¹⁴⁷

Under the LOSC, coastal States have jurisdiction over marine scientific research in their EEZ.¹⁴⁸ However, the LOSC has neither definitions nor provisions regarding hydrographic surveys, military surveys or surveillance activities in the EEZ. The United States defines “hydrographic survey” as:

...the obtaining of information in coastal or relatively shallow areas for the purpose of making navigational charts and similar products to support safety of navigation. A hydrographic survey may include measurements of the depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides and water stages, and hazards to navigation.¹⁴⁹

A “military survey” has been defined by the United States as:

...the collecting of marine data for military purposes and, whether classified or not... generally not made publicly available. A military survey may include collection of

¹⁴⁴ See James Kraska and Raul Pedrozo, *International Maritime Security Law* (Koninklijke Brill NV, Leiden, The Netherlands, 2013) 306.

¹⁴⁵ LOSC, art 56; see also Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 9, 12.

¹⁴⁶ Ibid; see also Bernard H Oxman, 'Transit of Strait and Archipelagic Waters by Military Aircraft' (2000) 4 *Singapore Journal of International & Comparative Law* 377, 395.

¹⁴⁷ Chris Rahman and Martin Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' (2010) 41(4) *Ocean Development & International Law* 315, 325.

¹⁴⁸ LOSC, art 56.

¹⁴⁹ The Commander's Handbook on the Law of Naval Operations above n 137.

oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data.¹⁵⁰

According to the United States, “the primary difference between marine scientific research and hydrographic surveys and military surveys is how the data is used once it is collected.”¹⁵¹ Thus, the United States affirms that marine scientific research in the EEZ is subject to the coastal State’s consent; however, “the coastal nation cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.”¹⁵² By contrast, China enacted its Surveying and Mapping Law in 2002, defining surveying and mapping as “the surveying, collection and presentation of shape, size, spatial location and properties of the natural geographic factors or the man-made facilities on the surface, as well as the activities for processing and providing the obtained data, information and achievements.”¹⁵³ Moreover, Article 7 of this statute stipulates that surveying and mapping activities taking place “in the domain of the People's Republic of China and other sea areas under the jurisdiction of the People's Republic of China” must be subject to the approval of the People's Republic of China.¹⁵⁴ With this very broad definition, the statute purports to regulate hydrographic surveys, military surveys, as well as surveillance activities in the EEZ.¹⁵⁵ According to Zou Keyuan, “it is hard to understand the logic of the argument that while marine scientific research in the EEZ is subject to consent of the coastal State, military activities can be conducted freely without any

¹⁵⁰ Ibid.

¹⁵¹ Pedrozo, above n 145, 22.

¹⁵² The Commander’s Handbook on the Law of Naval Operations, above n 137.

¹⁵³ *The Surveying and Mapping Law of the People's Republic of China (Order of the President No.75), adopted on 29 August 2002 (entered into force 1 December 2002)*

<http://www.mlr.gov.cn/mlrenglish/laws/200710/t20071012_656326.htm>, art 2.

¹⁵⁴ Ibid art 7.

¹⁵⁵ Pedrozo, above n 151, 21.

check by the coastal State.”¹⁵⁶ However, according to a fundamental legal principle, Zou Keyuan agrees that “nothing is illegal if there is no law to make it so.”¹⁵⁷

During the Cold War, military activities (such as intelligence gathering and surveillance assessments), were freely conducted outside the national waters and airspaces of coastal States by vessels and aircraft of both Western alliance countries and Soviet bloc States without any legal protests.¹⁵⁸ China has consistently protested U.S. military activities in China’s EEZ; however, China itself has conducted military intelligence collection in the EEZs of other States.¹⁵⁹ Therefore, it is hard to prohibit these activities based on international law or the practice of States.

The LOSC is totally silent on the issue of weapons testing and military exercises in the EEZ. The question is whether weapons testing and military exercises can be categorised as “internationally lawful uses of the sea” that are “associated with the operation of ships, aircraft [etc]” as permitted in article 58(1) of the LOSC, or whether these activities violate the “peaceful purpose” provisions of article 88 or constitute an abuse of rights under article 300 of the LOSC. Another issue to be determined is whether coastal States should be notified of such military activities, thereby ensuring that their economic activities in the EEZ will not be disrupted. Some authors argue that it is reasonable to notify the coastal State for certain types of military activities, such as those involving live firing exercises, but that such notification may not be reasonable for other activities, such as military reconnaissance.¹⁶⁰

¹⁵⁶ Zou Keyuan, *Law of the Sea in East Asia* (Routledge, 2005) 19.

¹⁵⁷ Ibid 18.

¹⁵⁸ Raul Pedrozo, 'Military Activities in the Exclusive Economic Zone: East Asia Focus' (2014) 90 *International Law studies* 514, 528.

¹⁵⁹ Zachary Keck, *China Is Spying on RIMPAC* (20 July 2014) The Diplomat <<http://thediplomat.com/2014/07/china-is-spying-on-rimpac/>>.

¹⁶⁰ Beckman and Davenport, above n 121, 26.

Article 56 of the LOSC provides coastal States with jurisdiction in the EEZ with regard to the protection and preservation of the marine environment. However, article 236 makes it clear that provisions concerning this issue “do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.”¹⁶¹ This means that sovereign immune vessels and aircraft, whether in the EEZ or elsewhere, are not legally bound by LOSC provisions regarding the protection and preservation of the marine environment as implemented in internationally accepted rules and regulations, such as those contained in the International Convention for the Prevention of Pollution from Ships (MARPOL).¹⁶² However, they shall “act in a manner consistent, so far as is reasonable and practicable”, with the environmental provisions of the LOSC.¹⁶³

4.3.1.6 High Seas

The LOSC defines the high seas as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”¹⁶⁴ Under the LOSC, the high seas are open to all States and no State may validly purport to subject any part of the high seas to its sovereignty.¹⁶⁵ All ships and aircraft enjoy the freedoms of navigation and overflight on the high seas, provided due regard is shown for the interests of other States and for the rights conferred by the LOSC with respect to activities in the Area.¹⁶⁶ Article 92 makes it clear that a flag State has exclusive jurisdiction over vessels flying

¹⁶¹ LOSC, art 236.

¹⁶² See Pedrozo, above n 151, 23.

¹⁶³ LOSC, art 236.

¹⁶⁴ LOSC, art 86.

¹⁶⁵ LOSC, art 88.

¹⁶⁶ LOSC, art 87.

its flag on the high seas.¹⁶⁷ There are, however, some exceptions to this rule, such as piracy, slave trading, drug trafficking, unauthorised broadcasting and Stateless ships. In these cases, warships and authorised government vessels have some rights of interdiction over foreign flag vessels on the high seas.¹⁶⁸ Warships and other government vessels operated for non-commercial purposes have complete sovereign immunity on the high seas.¹⁶⁹ Article 88 requires that the high seas be reserved for peaceful purposes.¹⁷⁰ Article 301 of the LOSC, entitled “peaceful uses of the seas”, makes it clear that “States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”¹⁷¹ Some authors have suggested that the principle of peaceful use of the high seas “presupposes certain military activity, but any aggressive activities are prohibited.”¹⁷² Tsarev lists certain military activities that are considered illegal actions on the high seas, including:

...tests of nuclear weaponry; establishing naval and aircraft proving grounds, combat training areas within close proximity of the shore of foreign states or navigation routes of significant importance to international navigation; missile, torpedo, artillery and other shooting, in particular, in areas allocated by international programmes for scientific research and requiring the permanent presence of scientific research vessels for certain periods of time; and the installation of autonomous buoy stations.¹⁷³

¹⁶⁷ LOSC, art 92.

¹⁶⁸ LOSC, art 109 & 110.

¹⁶⁹ LOSC, art 95 & 96.

¹⁷⁰ LOSC, art 88.

¹⁷¹ LOSC, art 301.

¹⁷² R.V. Dekanozov, 'The principle of peaceful use in the law of the sea and space law' (July 1988) *Maritime Policy* 271, 275; see also V F Tsarev, 'Peaceful uses of the seas: Principles and complexities' (April 1988) *Marine Policy* 153, 156-7.

¹⁷³ Tsarev, above n 172, 157.

Van Dyke has argued that military activities on the high seas can only be deemed legitimate “if they do not impede navigation, interfere with fishing activities, cause any significant harm to the environment or threaten human settlements.”¹⁷⁴ Nevertheless, the official text of the LOSC does not contain any provisions expressly prohibiting or permitting certain types of military activities on the high seas.

4.3.2 Other international laws related to the navigation of sovereign immune vessels and aircraft at sea

4.3.2.1 International Regulations for Preventing Collisions at Sea

Apart from the LOSC, another international legal instrument applicable to sovereign immune vessels in a maritime context is the International Regulations for Preventing Collisions at Sea (COLREGs). COLREGs was adopted by the International Maritime Organization (IMO) on 20 October 1972 and entered into force on 15 July 1977. All littoral States of the South China Sea as well as the United States are parties to this Convention. COLREGs defines a vessel as “every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.”¹⁷⁵ With the “[desire] to maintain a high level of safety at sea”, COLREGs’ rules “apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels”.¹⁷⁶ Accordingly, sovereign immune vessels (with the exception of submarines) are subject to COLREGs. Even though COLREGs entered into force before the LOSC, the application of COLREGs to all navigable waters connected to the high seas clearly includes the territorial sea and

¹⁷⁴ Jon M Van Dyke, 'Military exclusion and warning zones on the high seas' (May 1991) *Marine Policy* 147, 168.

¹⁷⁵ Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972 (entered into force 15 July 1977) [hereafter COLREGs], rule 3(a).

¹⁷⁶ Ibid rule 1.

the new EEZ regime under the LOSC.¹⁷⁷ LOSC article 94 stipulates that every State shall take necessary measures to ensure ships flying its flag observe the applicable international regulations relating to the prevention of collisions at sea.¹⁷⁸ Rule 2 of the COLREGs makes it clear that the ship's commander has to strictly comply with COLREGs and "the ordinary practice of seamen" to avoid collision.¹⁷⁹ Meanwhile rule 8 requires that any action to avoid collision be "made in ample time and with due regard to the observance of good seamanship."¹⁸⁰ The regulations set out in COLREGs are widely known as the international maritime "Rules of the Road." Despite nations having conflicting views on maritime boundaries and competing claims for jurisdiction over certain maritime zones, their vessels and mariners are all bound by the rules set out in COLREGs.¹⁸¹

4.3.2.2 International Convention for the Safety of Life at Sea

The International Convention for the Safety of Life at Sea (SOLAS) was adopted on 1 November 1974 and entered into force on 25 May 1980. The SOLAS Convention is "generally regarded as the most important of all international treaties concerning the safety of merchant ships."¹⁸² Even though SOLAS does not apply to warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on government non-commercial service, regulation 1 of chapter V of SOLAS (regarding the safety of navigation), clearly states that these types

¹⁷⁷ Jonathan G. Odom, 'The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (outside of China) Should be Concerned.' (2010) 18(3) *Michigan State Journal of International Law* 1, 18.

¹⁷⁸ LOSC, art 94.

¹⁷⁹ COLREGs, rule 2(a).

¹⁸⁰ COLREGs, rule 8.

¹⁸¹ Odom, above n 177, 17.

¹⁸² *International Convention for the Safety of Life at Sea (SOLAS)*, 1974 International Maritime Organization <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)>.

of ships are “encouraged to act in a manner consistent, so far as reasonable and practicable, with this chapter.”¹⁸³ Regulation 14 of chapter V of SOLAS requires contracting governments to adopt measures to ensure that “all ships shall be sufficiently and effectively manned” - a reference to the Principles of Safe Manning adopted by the IMO by resolution A.890(21).¹⁸⁴ Resolution A.890(21) requires all ships to maintain safe navigational watches and comply with COLREGs at all times.¹⁸⁵ Many navies have applied similar SOLAS standards to their naval ships, with one widely accepted example being the Naval Ship Code adopted by the North Atlantic Treaty Organization (NATO). This Code requires that in order to ensure the safety of life at sea, all ships shall be sufficiently and efficiently manned, and personnel in charge of a navigational watch are to have attained the appropriate standards of The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).¹⁸⁶

4.3.2.3 Convention on International Civil Aviation

The Convention on International Civil Aviation (Chicago Convention) was signed on 7 December 1944 and entered into force on 4 April 1947.¹⁸⁷ Importantly, the Chicago Convention applies to civil aircraft only; thus State aircraft, including aircraft used in military, customs and police services (sovereign immune aircraft), are not subject to the Convention’s regulations.¹⁸⁸ However, the Chicago Convention does prohibit state aircraft from flying over the territory of another State without prior authorisation.¹⁸⁹ The term “territory” is defined in article 2 of the Chicago Convention as including “land

¹⁸³ International Convention for the Safety of Life at Sea, adopted on 1 November 1974 (entered into force on 25 May 1980), Chapter V, regulation 1.

¹⁸⁴ Ibid regulation 14.

¹⁸⁵ IMO Resolution A.890(21), Principles of Safe Manning, adopted on 25 November 1999.

¹⁸⁶ NATO Standardization Agency, NATO Standard: Naval Ship Code, adopted January 2014. IX-26.

¹⁸⁷ Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947) (hereafter Chicago Convention), art 3.

¹⁸⁸ Ibid.

¹⁸⁹ Chicago Convention, art 3.

areas and territorial waters.”¹⁹⁰ The LOSC article 2 clarifies the meaning of the term “territorial waters”, and does not provide the right of innocent passage over territorial waters for foreign aircraft.¹⁹¹ The Chicago Convention does not contain any provisions regarding the flight of state aircraft beyond the land areas and territorial waters of coastal States. However, new obligations have been added for state aircraft in the LOSC. Article 39 of the LOSC stipulates that in exercising transit passage through a strait used for international navigation, state aircraft “will normally comply” with the safety measures of the Rules of the Air established by the International Civil Aviation Organization (ICAO) as they apply to civil aircraft, as well as “operating with due regard for the safety of navigation” at all times.¹⁹² This requirement applies *mutatis mutandis* to archipelagic sea lanes of archipelagic States.¹⁹³ During UNCLOS III, Spain proposed to delete the word “normally” from article 39 of the Convention, with the effect that state aircraft would not need to comply with the Rules of the Air at all times. However, this proposal was defeated.¹⁹⁴ Thus, under the LOSC, state aircraft are expected to comply with the Rules of the Air established by ICAO when exercising the rights of transit passage and archipelagic sea lanes passage.

As the Chicago Convention was adopted before the LOSC, the world’s airspace (as reflected in the Chicago Convention) broadly consisted of national airspace above the land areas and territorial waters of a State, as well as international airspace above the high seas but beyond national airspace. National airspace is subject to exclusive sovereignty of the State, while international airspace is subject to the Rules of Air

¹⁹⁰ Chicago Convention, art 2.

¹⁹¹ See LOSC, art 2 for the definition of the territorial sea. Part II, section 3 of LOSC provides the right of innocent passage for ships, not aircraft.

¹⁹² LOSC, art 39.

¹⁹³ LOSC, art 54.

¹⁹⁴ Oxman, above n 145, 400.

adopted by ICAO.¹⁹⁵ After the LOSC was opened for signature, ICAO conducted a study on the impact of the LOSC EEZ regime on the application of the Chicago Convention. The result of this study, which was published in 1987, was that all States enjoy full freedom of navigation and overflight in the EEZ and that the EEZ “is deemed to have the same legal status as the high seas.”¹⁹⁶ Therefore, the international airspace referred to in ICAO rules includes the airspace above the EEZ. Therefore, ICAO considers the EEZ to be the same as the high seas with regard to the freedom of overflight. ICAO’s position on this issue lends support to the view that the freedom of overflight of military aircraft on the high seas could be applied to the airspace above the EEZ.¹⁹⁷

In summary, the Chicago Convention and the LOSC both require States to ensure that their state aircraft operate with “due regard for the safety of navigation of civil aircraft.”¹⁹⁸ The Chicago Convention does not address the interaction between state aircraft in international airspace.

4.4 Conclusion

There are a number of international legal instruments applicable to the passage of sovereign immune vessels and the overflight of aircraft at sea. In addition to the LOSC, international instruments such as the Chicago Convention, SOLAS and COLREGs contain provisions regarding navigation and/or overflight. The LOSC provides detailed navigation regimes in different maritime jurisdictional zones. Indeed,

¹⁹⁵ Chicago Convention, Rules of the Air, Annex 2.

¹⁹⁶ Consideration of the Report of the Rapporteur on “United Nations Convention on the Law of the Sea—Implications, If Any, for the Application of the Chicago Convention, Its Annexes and Other International Air Law Instruments,” ICAO Doc. No. LC/26/WP/5-1, 4 February 1987, 260.

¹⁹⁷ Andrew S Williams, ‘Aerial Reconnaissance by Military Aircraft in the Exclusive Economic Zone’ in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) 53.

¹⁹⁸ Chicago Convention, art 3.

there are four broad passage regimes applicable to sovereign immune vessels and aircraft. These include: (i) innocent passage through the territorial sea of coastal States (a regime which only applies to ships, not aircraft); (ii) transit passage through straits used for international navigation; (iii) archipelagic sea lanes passage through archipelagic sea lanes; and (iv) the freedom of navigation and overflight in the EEZ and on the high seas. In exercising these rights of passage, ships and aircraft shall comply with the provisions of the LOSC with regard to each zone. However, as the aim of the LOSC is to create a normative framework rather than deal with all issues of ocean governance comprehensively¹⁹⁹, there are a number of issues on which the LOSC remains silent. States have different interpretations and conflicting views over many provisions in the LOSC related to the passage of sovereign immune vessels and aircraft, particularly the right of innocent passage of warships and military activities in the EEZ. Coastal States continually seek to extend their control over their maritime zones, while maritime user States continue to assert their navigational rights in different maritime zones. It is unlikely that the international community will reach a uniform legal stance regarding the passage of sovereign immune vessels and aircraft. That being so, and in order to avoid unwanted incidents at sea, it is imperative that States exercise their rights and duties in good faith, and while taking into account the interests of specific stakeholders and the international community as a whole.

¹⁹⁹ Beckman and Davenport, above n 121, 16.

5 COASTAL STATE PRACTICE IN IMPLEMENTING THE INNOCENT PASSAGE REGIME

5.1 Introduction

Since its inception, the United Nations Convention on the Law of the Sea (LOSC) has set out the navigational rights of vessels and aircraft in various maritime jurisdictional zones. Indeed, the Convention establishes four different navigation regimes, including innocent passage, transit passage, archipelagic sea lanes passage, as well as the freedom of navigation. Despite the widespread ratification of, or accession to, the LOSC, State practice is still divergent with regard to the passage of sovereign immune vessels and aircraft under each passage regime. Within the geographical limits of the South China Sea, innocent passage and the freedom of navigation are the two relevant passage regimes which will be discussed in this chapter and the next respectively.

The most controversial issue under the innocent passage regime is the right of innocent passage for foreign warships. As discussed in the previous chapter, the LOSC is silent on the passage of warships through the territorial sea of coastal States. Absent any guidance from the LOSC, several States surrounding the South China Sea have enacted laws and regulations restricting the innocent passage of warships and government vessels in their territorial waters. The inconsistencies which exist between the domestic laws of coastal States, international law, and State practice on this issue have created confusion and controversies for sovereign immune vessels exercising the right of innocent passage in this maritime region. To elucidate these challenges, this chapter will examine the practice of South China Sea littoral States in implementing the LOSC innocent passage regime, as well as a number of political and strategic factors affecting contemporary trends in State practice.

5.2 Domestic legislation and the practice of coastal States regarding the innocent passage regime

5.2.1 China

The doctrine of innocent passage was first codified in treaty form at the first United Nations Conference on the Law of the Sea 1958 (UNCLOS I) in the Geneva Convention on the Territorial Sea and Contiguous Zone.¹ At that time, the Republic of China (Taiwan) still occupied China's seat in the United Nations, and thus the People's Republic of China (China) was unable to attend.²

Despite China's absence from UNCLOS I, the resulting Conventions were incorporated into China's domestic legislation. On 4 September 1958 China issued the Declaration on China's Territorial Sea (the 1958 Declaration), which is considered to be China's first legal instrument on the territorial sea.³ This Declaration states that the breadth of China's territorial sea is 12 nautical miles. With regard to the innocent passage regime, the Declaration provides that:

No foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China. While navigating in the Chinese territorial sea, every foreign vessel must observe the relevant laws and regulations laid down by the Government of the People's Republic of China⁴

The Declaration does not mention foreign merchant ships; however, it can be understood from the text of the Declaration that foreign merchant ships enjoy the right of innocent passage through China's territorial sea (provided they observe relevant

¹ *Convention on the Territorial Sea and Contiguous Zone*, done at Geneva on 29 April 1958 (entered into force 10 September 1964), art 14. This Convention, however, failed to establish the breadth of the territorial sea.

< http://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf >.

² Zou Keyuan, *China's Maritime Legal System and the Law of the Sea* (Martinus Nijhoff, 2005) 59.

³ Ibid 63.

⁴ See 'Declaration on China's Territorial Sea' in Jeanette Greenfield, *China and the Law of the Sea, Air, and Environment* (Sijthoff & Noordhoff, 1979) 243.

Chinese laws and regulations).⁵ According to Zou Keyuan, the rationale for this Declaration was to “deter U.S. warships, which supported logistically the Nationalist Chinese in Taiwan, from approaching the coast of the main land of China.”⁶ In his 1959 article titled “Questions Relating to the Territorial Sea of Our Country”, Fu Zhu asserted that:

First, since international law recognizes that the sovereignty of a State extends to its territorial sea and the air space over the territorial sea, the coastal State, for purposes of its security, naturally has the indisputable right to prescribe that all foreign aircraft and military vessels cannot enter its territorial sea without prior authorization...Second, in State practice quite a few States have provisions in their national laws similar to that included in China’s Declaration on the Territorial Sea.⁷

A contrary position was subsequently taken by Zhou Genshen, a leading Chinese legal commentator. According to Zhou, the Geneva Convention grants ships of all States, regardless of their status as warships or merchant vessels, the right of innocent passage. Even so, he has conceded that “this definitely cannot represent the general State practice and is not a rule acceptable to all States...according to generally recognized rules of international law States have nevertheless the right to prescribe that for the passage of foreign warships advance authorization must be obtained.”⁸

At the third United Nations Conference on the Law of the Sea (UNCLOS III), the delegation from China argued that the innocent passage regime should apply to merchant ships but not military vessels, and that foreign military vessels needed to

⁵ See also Zou Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice' (1998) 29 *Ocean Development & International Law* 195, 202.

⁶ Ibid.

⁷ Fu Zhu, 'Questions Relating to the Territorial Sea of Our Country [in Chinese]' (1959) *Beijing: People's Daily Publishing House*, 23 quoted in Keyuan, above n 5, 204; see also Shao Jin, 'The question of innocent passage of warships after UNCLOS III' (1989) (January) *Marine Policy* 56, 59.

⁸ Zhou Genshen, 'International Law [in Chinese]' (1976) 1 *Beijing: Commercial Press* 370 quoted in Jin, above n 7, 59.

tender prior notification or obtain prior authorisation from coastal States before exercising the right of innocent passage through a coastal State's territorial sea.⁹ Due to objections from the majority of participating States, the final text of the LOSC does not contain any provisions specifically regulating the innocent passage of warships. On 9 December 1982, at the final session of UNCLOS III, the head of the Chinese delegation Mr Han Xu stated that:

The Convention is not entirely satisfactory to us. At the previous sessions of the Conference we repeatedly pointed out that in the articles of the Convention relating to innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea. A considerable number of States, including China, time and again submitted an amendment in this regard. To respond to the call of the President of the Conference, those sponsors of the amendment did not insist on a vote at the session held last April so that the draft convention on the law of the sea could be adopted by consensus. The statement made by the President of the Conference at that session showed clearly that this would not affect the principled position of the sponsors demanding that their security be ensured.¹⁰

On 9 February 1983 China enacted the Maritime Traffic Safety Law, which entered into force on 1 January 1984. This law reaffirmed the stance taken by the 1958 Declaration in that it prohibited "military vessels of foreign nationality...[from] enter[ing] the territorial sea of the People's Republic of China without being authorized by the Government thereof."¹¹

⁹ Keyuan, above n 2, 61.

¹⁰ See Statement by Han Xu at the 191st Meeting, UN Doc. A/CONF.62/SR.191

<http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-191.pdf>.

¹¹ See China's National People's Congress, *Maritime Traffic Safety Law of the People's Republic of China*, adopted 9 February 1983 (entered into force 1 January 1984), art 11.

<<http://www.asianlii.org/cn/legis/cen/laws/mtslotproc496/>>.

More importantly, in 1992 China promulgated the Law on the Territorial Sea and the Contiguous Zone (China's Territorial Sea Law), in which "non-military foreign ships enjoy the right of innocent passage through the territorial sea of the People's Republic of China according to law." In relation to foreign military ships, the statute provides that such vessels "must obtain permission from the Government of the People's Republic of China."¹² By virtue of this enactment, China expressly granted innocent passage for foreign merchant vessels for the first time – a position consistent with the LOSC.¹³ However, the prior authorisation requirement for the passage of foreign warships in its territorial sea was protested by many maritime States, including the United States.¹⁴

China's Territorial Sea Law also states that foreign submarines and other underwater vehicles must navigate on the surface of the sea and show their flags when passing through the State's territorial sea.¹⁵ If a foreign warship or foreign government ship operated for non-commercial purposes violates these laws and regulations, the relevant responsible organs of the People's Republic of China shall have the right to order it to leave the territorial sea immediately. Moreover, any "losses or damage caused shall be borne by the nations whose flag is being flown by the ship in question."¹⁶

¹² See Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (effective 25 February 1992), art 6
<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf>.

¹³ Keyuan, above n 2, 65.

¹⁴ The US protested the 1992 prior permission requirement and conducted operational assertions in 1992, 1993, 1994, and 1996; see *China, People's Republic of* (April 2013)
<<http://www.jag.navy.mil/organization/documents/mcrm/China2013.pdf>>.

¹⁵ Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (effective 25 February 1992), art 7.

¹⁶ *Ibid* art 10.

Apart from the passage of warships, China's Territorial Sea Law is generally consistent with the provisions of the LOSC. However, with regard to the contiguous zone, this Law states that:

The People's Republic of China has the authority to exercise powers within its contiguous zone for the purpose of preventing or punishing infringement of its security, customs, fiscal, sanitary laws and regulations or entry-exit control within its land territories, internal waters or territorial sea.¹⁷

Article 33 of the LOSC makes it clear that in the contiguous zone, the coastal State may exercise powers to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”¹⁸ The inclusion of the word “security” in China's Territorial Sea Law is inconsistent with article 33,¹⁹ and has the effect of restricting the passage of foreign sovereign immune vessels and aircraft in China's contiguous zone.

When China ratified the LOSC in 1996, it made the following statement regarding the innocent passage regime:

The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.²⁰

¹⁷ Ibid art 13.

¹⁸ LOSC, art 33.

¹⁹ Zou Keyuan, *Law of the Sea in East Asia* (Routledge, 2005) 36.

²⁰ See *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter*
<http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

According to the LOSC, “no reservations or exceptions may be made to the Convention unless expressly permitted by other articles of this Convention.”²¹ Therefore, China may not make a reservation regarding the innocent passage of warships in its territorial sea. Moreover, it is internationally recognised that a State cannot invoke the provisions of its domestic law as justification for its failure to perform its treaty obligations.²² Another problem with the above statement is that it is inconsistent with the text of China’s own Territorial Sea Law. Indeed, while the statement above prescribes two alternative requirements for warships (i.e., advance approval or prior notification), the State’s Territorial Sea Law requires only prior authorisation, not prior notification. According to Zou Keyuan, it is unclear whether the intention behind the statement was to change the existing text of China’s Territorial Sea Law, and if so, it would be difficult for China’s competent authorities to enforce two alternative requirements.²³ It is also unclear whether the two alternative requirements apply to different types of warships or warships from different States.²⁴

In practice, there have been a number of incidents involving Chinese military vessels in the territorial sea. On 25 April 2001, three Australian warships were challenged by a Chinese warship while sailing through China’s territorial sea within the Taiwan Strait. The Chinese warship requested Australia’s warships to change their course; however, the three Australian warships continued to sail through the strait ignoring the radio request from the Chinese warship.²⁵ China complained that the passage of these three warships through its territorial sea had occurred without prior

²¹ LOSC, art 309.

²² See The United Nations, *Vienna Convention on the Law of Treaties*, adopted 22 May 1969 (entered into force 27 January 1980), article 27.

²³ Keyuan, above n 2, 84.

²⁴ Keyuan, above n 5, 214.

²⁵ *Australian warships rebuff Chinese navy in Taiwan Straits* (30 April 2001) Laredo Morning Times <<http://airwolf.lmtonline.com/news/archive/043001/pagea7.pdf>>.

authorisation, and thus Australia had violated Chinese law. Australia, however, argued that its ships had exercised the right of innocent passage recognised under international law.²⁶

Another incident took place on 10 November 2004, when a Japanese anti-submarine patrol aircraft detected a Chinese nuclear-powered submarine passing submerged through Japan's territorial sea near Sakishima-Gunto.²⁷ Japan lodged a protest in relation to the incident, and China responded by stating that the incursion into Japan's territorial waters was a mistake brought about by a "technical cause" during its normal training course.²⁸

Article 20 of the LOSC makes it clear that "in the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag."²⁹ Therefore, the submerged passage of the Chinese submarine through Japan's territorial sea is contrary to international law. Even so, China did not go as far as to apologise for the incursion, but simply expressed regret over the incident.³⁰ Miyoshi Masahiro has argued that "China failed to carry out its responsibility for its incursion, if unintended, into another country's territorial waters in a manner contrary to international law."³¹ As China requires foreign submarines and other underwater vehicles to navigate on the surface and to show their flags while passing through its

²⁶ Thomas Windsor, 'Innocent passage of warships in East Asian territorial seas' (2011) 3(3) *Australian Journal of Maritime and Oceans Affairs* 73, 78.

²⁷ Miyoshi Masahiro, 'The Submerged Passage of a Submarine through the Territorial Sea - The Incident of a Chinese Atomic-Powered Submarine' (2006) *Singapore Year Book of International Law* 243, 243-44.

²⁸ Miyoshi Masahiro, 'The Submerged Passage of A submarine through the Territorial Sea - The Incident of a Chinese Atomic-Powered Submarine' (2006) *Singapore Year Book of International Law and Contributor* 243.

²⁹ LOSC, art 20.

³⁰ Masahiro, above n 27, 244.

³¹ Ibid.

territorial sea, the incident casts doubt on whether China would behave in a reciprocal fashion regarding the innocent passage of foreign submarines.

On 30 January 2016, the U.S. Navy sent a guided missile destroyer, the USS *Curtis Wilbur*, within 12 nautical miles of Triton Island in the Paracel Islands, claimed by China, Vietnam and Taiwan, and without giving prior notice to any of these claimants. Following the incident, China's Foreign Affairs spokeswoman Hua Chunying commented that "the U.S. warship violated Chinese law and entered China's territorial sea without authorization. The Chinese side conducted surveillance and vocal warnings to the U.S. warship."³² However, it is worth noting that in September 2015, five Chinese warships transited through U.S. territorial waters, within 12 nautical miles of the Aleutian Islands, in an exercise of innocent passage without prior notification to the United States.³³

In summary, China's domestic legislation requires prior authorisation for the innocent passage of foreign warships through its territorial sea. However, in its statement on the ratification of the LOSC, China stated that it requires prior notification *or* prior authorisation. This reveals a startling inconsistency with regard to China's policy on this issue. China's domestic legal framework on the regime of the contiguous zone is inconsistent with the provisions of the LOSC. Moreover, China's practice regarding the innocent passage of warships is incongruent with both its domestic legislation and the LOSC.³⁴ According to the international legal principle of *pacta sunt*

³² Quoted in Sam LaGrone, *China Upset Over 'Unprofessional' U.S. South China Sea Freedom of Navigation Operation* (31 January 2016) USNI News <<http://news.usni.org/2016/01/31/china-upset-over-unprofessional-u-s-south-china-sea-freedom-of-navigation-operation>>.

³³ Sam LaGrone, *Chinese Warships Made 'Innocent Passage' Through U.S. Territorial Waters off Alaska* (3 September 2015) USNI News <<http://news.usni.org/2015/09/03/chinese-warships-made-innocent-passage-through-u-s-territorial-waters-off-alaska>>.

³⁴ See Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Martinus Nijhoff 2005), 82; see also Guifang Xue, 'China and the Law of the Sea: An Update' (2008) 84 *International Law studies* 97, 103.

servanda, China is obliged to abide by the LOSC. Therefore, China should amend its domestic legislation to reflect the provisions of the LOSC.³⁵

5.2.2 Taiwan

Taiwan's membership in the United Nations was terminated in 1971 by United Nations General Assembly Resolution 2758 (XXVI) of 25 October 1971.³⁶ According to this Resolution, the representatives of the People's Republic of China are the only legitimate representatives of China to the United Nations.³⁷ As a result, Taiwan was not able to participate in UNCLOS III or become a party to the LOSC. The Chinese Government has claimed Taiwan as part of China; however, the Taiwanese government currently has territorial jurisdiction over Taiwan. In 1992, China and Taiwan reached a verbal consensus on a "one China, respective interpretations" concept (1992 Consensus), in which:

Both sides of the Taiwan Strait agree that there is only one China. However, the two sides of the Strait have different opinions as to the meaning of "one China." To Peking, "one China" means the "People's Republic of China (PRC)," with Taiwan to become a "Special Administration Region" after unification. Taipei, on the other hand, considers "one China" to mean the Republic of China (ROC), founded in 1911 and with *de jure* sovereignty over all of China. The ROC, however, currently has jurisdiction only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is part of China, and the Chinese mainland is part of China as well.³⁸

³⁵ Keyuan, above n 34, 86.

³⁶ See United Nations Resolution 2578(XXVI)

<[http://daccess-dds-](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0327/74/IMG/NR032774.pdf?OpenElement)

[ny.un.org/doc/RESOLUTION/GEN/NR0327/74/IMG/NR032774.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0327/74/IMG/NR032774.pdf?OpenElement)>.

³⁷ Ibid.

³⁸ Text published in: Mainland Affairs Council, Executive Yuan, Republic of China, "Consensus Formed at the National Development Conference on Cross-Strait Relations," February 1997, Quoted in Shirley A. Kan, 'China/Taiwan: Evolution of the "One China" Policy—Key Statements from Washington, Beijing, and Taipei' (CRS Report for Congress, 26 August 2013), 46.

Like China, Taiwan has adopted laws and regulations with regard to its maritime zones. It is interesting to note that as China and Taiwan have each claimed governance over the whole of China, their maritime claims are identical.³⁹ However, the laws and regulations that apply to these claimed areas are different. In practice, China and Taiwan have only publicised the baselines for measuring the territorial sea for *actual areas* under their jurisdiction, and “the laws of both sides only apply to the respective territorial sea areas within the exercise of their actual jurisdiction.”⁴⁰

In 1980, Taiwan issued Regulations on the Control of Foreign Military Vessels Entering into ROC Territorial Waters and Harbours. Under these Regulations, foreign military vessels seeking to enter Taiwan’s territorial waters or harbours were required to obtain prior approval from Taiwan’s Ministry of Foreign Affairs at least ten days prior to passage.⁴¹ However, these Regulations were suspended after the promulgation of the Law on the Territorial Sea and the Contiguous Zone of the Republic of China in 1998 (Taiwan’s Territorial Sea Law). Regarding the innocent passage regime, article 7 of Taiwan’s Territorial Sea Law states that:

Foreign civil vessels may, under the reciprocity principle, enjoy the right of innocent passage through the territorial sea of the Republic of China as long as the passage is not prejudicial to the peace, good order and security of the Republic of China...

Foreign military or government vessels shall give prior notice to the authorities concerned before their passage through the territorial sea of the Republic of China....⁴²

³⁹ See also Yann Huei Song and Zou Keyuan, 'Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States' (2000) 31(4) *Ocean Development & International Law* 303, 304 & 312.

⁴⁰ Ibid 312 & 314.

⁴¹ Nien-Tsu Alfred Hu, 'The Two Chinese Territorial Sea Laws: Their Implications and Comparisons' (1993) 20 *Ocean & Coastal Management* 89, 95, above n 17; see also 外國軍艦駛入中華民國領海港口管制辦法 <<http://law.moj.gov.tw/LawClass/LawAllIf.aspx?PCode=F0100014>>.

⁴² Law on the Territorial Sea and the Contiguous Zone of the Republic of China, promulgated on 21 January 1998 (entered into force 21 January 1998) <<http://www.land.moi.gov.tw/law/enhtml/inquiriesdetail.asp?elid=76>>.

According to this article, the innocent passage of civil vessels requires reciprocity. This requirement is inconsistent with the provisions of the LOSC, which do not require such reciprocity. In comparison with China's Territorial Sea Law, the requirement of prior notification for the passage of foreign military vessels is "softer" than prior authorisation. However, it is still inconsistent with the LOSC. Moreover, the requirement of prior notification applies not only to military vessels but also other government vessels. This is an untenable position as the innocent passage of government vessels (other than military vessels) is hardly a controversial issue in international law.

Article 10 of Taiwan's Territorial Sea Law states that:

For protecting national security and national interests, the Government of the Republic of China may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign vessels.⁴³

The inclusion of "national interests" in this article is inconsistent with the LOSC. Indeed, article 25 of the LOSC only allows a coastal State to suspend temporarily the innocent passage of foreign ships "if such suspension is essential for the protection of its security, including weapons exercises", not for the protection of the coastal State's interests in general.⁴⁴

Although Taiwan is not a party to the LOSC, the territorial sea provisions of the LOSC reflect customary international law which is binding on all States. For this reason, Taiwan's Territorial Sea Law should reflect the relevant provisions of the LOSC.

⁴³ Ibid article 10.

⁴⁴ See LOSC, art 25(3).

5.2.3 Vietnam

Vietnam made its first law of the sea-related declaration on 12 May 1977, known as the Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (1977 Statement). In this Statement, Vietnam claimed a territorial sea of 12 nautical miles and a contiguous zone extending 12 nautical miles beyond the outer limit of the territorial sea.⁴⁵ Vietnam declared that it “exercises full and complete sovereignty over its territorial sea as well as the superjacent airspace and the bed and subsoil of the territorial sea.”⁴⁶ This Statement was generally in conformity with the wording of the Negotiation Text of the fourth UNCLOS session, 1976.⁴⁷ However, regarding the contiguous zone, the 1977 Statement provides that:

The Government of the Socialist Republic of Vietnam exercises the necessary control in its contiguous zone in order to see its security and custom and fiscal interests and to ensure respect for its sanitary, emigration and immigration regulations within the Vietnamese territory or territorial sea.⁴⁸

As with China, Vietnam’s Statement contains an express reference to security control in the contiguous zone. Indeed, by that time a total of 14 States had included a reference to security purposes in connection with their 12 nautical mile contiguous zone.⁴⁹ Nevertheless, the 1977 Statement was made before the LOSC was opened for signature. Furthermore, paragraph 6 of the 1977 Statement made it clear that all

⁴⁵ See Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977, published in Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (Martinus Nijhoff, 1998), appendix 3.

⁴⁶ Ibid.

⁴⁷ Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (Martinus Nijhoff Publishers, 1998) 46.

⁴⁸ Ibid.

⁴⁹ Ibid 56.

questions relating to Vietnamese maritime zones would be dealt with in detail in further regulations and “in keeping with international law and practices.”⁵⁰

The 1977 Statement did not mention the right of innocent passage of foreign ships in the Vietnamese territorial sea. Vietnam’s first official statement regarding the innocent passage regime was the Regulation for Foreign Vessels to Operate on Sea Areas of the Socialist Republic of Vietnam dated January 29, 1980 (Decree No.30-CP). According to article 3 of the decree, foreign military vessels, including warships and auxiliary vessels seeking to enter the contiguous zone and the territorial sea of Vietnam, must apply for permission from the Vietnamese Government through diplomatic channels at least 30 days prior to passage. Once permission has been granted, a 48 hour pre-entry notification to the Vietnamese Ministry of Communications and Transport is required before passing through the State’s contiguous zone.⁵¹ Foreign submarines are required to navigate on the surface and show their flags if permitted to enter the contiguous zone. In addition, foreign submarines must observe the regulations pertaining to foreign surface ships operating in Vietnam’s maritime zones.⁵² These requirements are inconsistent with the provisions of the LOSC because: (i) the contiguous zone is a special part of the EEZ in which States can exercise only limited policing powers; and (ii) the contiguous zone is subject to the freedom of navigation regime. Moreover, article 5 of Decree No.30-CP states that:

Unless otherwise authorized by the Government of the SRVN, not more than three warships of the same nationality may be present simultaneously in the territorial sea or

⁵⁰ Ibid.

⁵¹ Vietnam's Decree No. 30-CP on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones (29 January 1980), art 3(c)
< <http://faolex.fao.org/docs/pdf/vie4470.pdf>>.

⁵² Ibid art 10.

internal waters of Vietnam and the maximum stay of all or any of such ships must not exceed one week.⁵³

Article 5 is also at variance with the LOSC because the right of innocent passage is not conditional on the number of ships in the territorial sea at any one time. As Decree No.30-CP was issued before the LOSC opened for signature, and after longstanding struggles for the unification of the country, the Decree is very much a product of Vietnam's political milieu at that time. Indeed, Vietnam was more concerned with sovereignty matters than its international obligations. Upon signing the LOSC on December 10, 1982, Vietnam made no declarations or statements. However, a statement was made when Vietnam ratified the LOSC on 25 July 1994. The statement provides that:

The National Assembly authorizes the National Assembly's Standing Committee and the Government to review all relevant national legislation to consider necessary amendments in conformity with the 1982 United Nations Convention on the Law of the Sea, and to safeguard the interests of Viet Nam.⁵⁴

The effect of this Statement is that after becoming a party to the LOSC, Vietnam would consider amending its domestic legislation to make it consistent with the provisions of the LOSC. In 2012 the Law of the Sea of Vietnam was enacted, with the statute providing that:

1. The provisions of this Law shall prevail in case there are differences between the provisions of this Law and those of other laws in relation to the sovereignty and legal status of Vietnam's maritime zones.

⁵³ Ibid art 5.

⁵⁴ See Statement upon Ratification of Vietnam 25 July 1994 at above n 20.

2. In case there are differences between the provisions of this Law and those of an International treaty to which the Socialist Republic of Vietnam is a contracting party, the provisions of the international treaty shall prevail.⁵⁵

It is clear that after entering into force on 1 January 2013, the Law of the Sea of Vietnam replaced all previous regulations in relation to the sovereignty and legal status of Vietnam's maritime zones. It is also clear that Vietnam will not invoke provisions of its Law of the Sea as justification for its failure to perform its treaty obligations. This is because under the State's new law, the international treaty prevails to the extent of any inconsistency. Regarding the innocent passage regime, article 12 of the Law of the Sea of Vietnam states that:

Vessels of all States enjoy the right of innocent passage through Vietnam's territorial sea. Foreign military vessels exercising the right of innocent passage through Vietnam's territorial sea shall give prior notice to competent Vietnamese authorities.⁵⁶

According to Vietnam's new Law of the Sea, foreign military vessels seeking passage through the State's territorial sea are only required to give prior notification, with no particular timeframe being set for such notification and no limitation on the number of vessels seeking passage at any one time. Article 26 of the Law of the Sea of Vietnam states that the Government of Vietnam may suspend or restrict the exercise of innocent passage in its territorial sea for the purposes of "safeguarding the sovereignty, national defence, security and interests or security of navigation, protecting marine resources and the marine ecology, combating pollution, tackling maritime accidents or marine environmental disasters, [and] preventing the spread of epidemics."⁵⁷ The prior notice requirement, as well as the very broad conditions for suspension or restriction of

⁵⁵ The Law of the Sea of Vietnam, signed on 21 June 2012 (entered into force 1 January 2013), art 2 <<http://faolex.fao.org/docs/pdf/vie124619.pdf>>.

⁵⁶ Ibid art 12.

⁵⁷ Ibid art 26.

innocent passage in Vietnam's territorial sea, are inconsistent with the LOSC. Indeed, compared to Decree No. 30 CP, Vietnam has attempted to bring its domestic law into alignment with the LOSC with this new enactment.

Regarding the contiguous zone, the Law of the Sea of Vietnam states that:

1. The State exercises sovereign rights, jurisdiction and other rights stipulated in Article 16 of this Law over the contiguous zone.
2. The State exercises control within the contiguous zone to prevent and punish acts of infringement of the law on customs, tariff, health or immigration committed in the territory or the territorial sea of Vietnam.⁵⁸

Considering that article 16 of this law focuses on the legal status of the EEZ, Vietnam recognises the contiguous zone as a special part of the EEZ subject to coastal State control over matters of customs, tariff, health and immigration. This is generally consistent with the provisions of the LOSC.

In summary, apart from the requirement for prior notification for the passage of foreign warships, and the application of broad conditions for the suspension or restriction of innocent passage, the Law of the Sea of Vietnam is generally consistent with the LOSC. Indeed, there have been no incidents regarding the passage of foreign warships through the territorial sea of Vietnam since the Law of the Sea of Vietnam came into force.

5.2.4 Indonesia

Indonesia is an archipelagic State bordering the South China Sea. It is the largest archipelago in the world, comprising 17,508 islands and encompassing in excess of 7.9 million square kilometres of sea area.⁵⁹ As mentioned in the previous chapter, the LOSC

⁵⁸ Ibid art 14.

⁵⁹ *Indonesia's Geography* AsianInfo <<http://www.asianinfo.org/asianinfo/indonesia/pro-geography.htm>>.

allows an archipelagic State to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs form archipelagic waters enclosed by archipelagic baselines.⁶⁰ From the archipelagic baselines, an archipelagic State has the right to establish the territorial sea, the contiguous zone, the EEZ and the continental shelf in accordance with the provisions of the LOSC.⁶¹ Regarding navigation, there are three different passage regimes through Indonesia's maritime zones, including archipelagic sea lanes passage, innocent passage and the freedom of navigation. However, within the geographical limits of the South China Sea as set out in this thesis, only innocent passage through Indonesia's territorial sea will be analysed.

Indonesia has issued a number of laws and regulations regarding the innocent passage regime, including Act No.4 of 18 February 1960 on Indonesian Waters (Act No.4/1960),⁶² Act No.6 of 8 August 1996 regarding Indonesian Waters (Act No. 6/1996),⁶³ and Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships Exercising Innocent Passage through Indonesian Waters (Government Regulation No.36/2002).⁶⁴ According to Act No.4/1960, "Indonesian waters consist of the territorial sea and the internal waters of Indonesia".⁶⁵ As "archipelagic waters" was a new concept at the time, it was not included in Act No.4/1960. All waters enclosed by Indonesia's baselines have been classified as Indonesian internal waters, and "innocent passage through the internal waters of Indonesia is open to foreign vessels."⁶⁶ For the

⁶⁰ LOSC, arts 47 & 49.

⁶¹ LOSC, art 48.

⁶² *Act No.4 of 18 February 1960 on Indonesian Waters*
<<http://www.state.gov/documents/organization/61544.pdf>>.

⁶³ *Act No.6 of 8 August 1996 regarding Indonesian Waters*
<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1996_Act.pdf>.

⁶⁴ Government Regulation Number 36 of 2002 on Rights and Responsibilities of Foreign Ships on Exercising Innocent Passage through Indonesian Waters (State Gazette Year 2002 No. 70, Supplementary State Gazette No. 4209).

⁶⁵ above n 62, art 1(1).

⁶⁶ Ibid art 1(3) & 3(1).

implementation of Act No.4/1960, Indonesia issued Government Decree No.8 of 1962 - Foreign Ships - Innocent Passage in the Indonesian Waters, which states that:

Before beginning their peaceful passage through the Indonesian waters or Indonesian internal waters, the foreign warships and foreign government ships which are not commercial ships are obliged to inform the Minister-Chief of Navy Staff, except that they sail in shipping lanes fixed by the Minister-Chief of Navy Staff.⁶⁷

In 1971 the President of Indonesia enacted Presidential Decree No.16 of 1971 titled Authority of Issuing Sailing Permits for Activities of Foreign Vessels in Indonesian Waters. According to this statute, foreign warships passing through Indonesian waters were required to obtain security clearance from the Minister of Defence and Security.⁶⁸ However, after Indonesia ratified the LOSC in 1985, it enacted Act No.6/1996 to implement the LOSC, thereby replacing Act No.4/1960 which was considered “not suitable anymore.”⁶⁹ As Act No.4/1960 was terminated, it could be argued that all laws and regulations which were passed to support and implement Act (including the Presidential Decree No.16 of 1971) are should be no longer valid. Article 11(1) of Act No.6/1996 states that: “Vessels of all countries, coastal as well as non-coastal countries, enjoy peaceful crossing rights through the territorial sea and waters of the Indonesian archipelago.”⁷⁰ Article 11(2) defines “crossing” and “peaceful crossing” in a similar way to the LOSC.⁷¹ Article 13(1) of Act No.6/1996 states that:

The Government of Indonesia can temporarily postpone the peaceful crossing of all kinds of foreign ships in certain regions of the territorial sea or the archipelagic waters

⁶⁷ See *Decree No. 8, 1962 - Foreign ships - Innocent Passage in the Indonesian Waters* (11 October 2014) <<http://faolex.fao.org/docs/pdf/ins1647.pdf>>.

⁶⁸ See Presidential Decree on Authority of Issuing Sailing Permits for Activities of Foreign Ships in Indonesian Waters.

⁶⁹ See Act No.6, above n 63.

⁷⁰ Ibid art 11(1).

⁷¹ Ibid art 11(2), (3); LOSC, arts 18, 19.

if such postponement is necessary for the protection of its security, including the purpose of arms/weapons training.⁷²

Regarding the passage of foreign warships and government vessels, article 17 of Act No.6/1996 states that:

The further provisions concerning the rights and obligations of foreign merchant ships, warships and Government vessels operated for commercial and non-commercial purposes in conducting a peaceful crossing right through the Indonesian waters, shall be regulated by Government Regulation.⁷³

For the implementation of Act No.6/1996, Indonesia promulgated Government Regulation No.36/2002. However, there is no provision in this Regulation regarding the passage of warships and government vessels. Therefore, as both the Act and the Regulation are silent on the passage of warships through Indonesia's territorial waters, it would appear that neither prior notification nor prior authorisation is required for the passage of warships and government vessels in Indonesian waters.

In 1992 and prior to the enactment of the above laws, Indonesia suspended the right of innocent passage through its territorial sea of the *Lusitania Expresso* - a Portuguese-registered car ferry which was carrying peace activists from Australia to East Timor. The suspension was made on grounds of public order and security.⁷⁴ However, the question which arose was whether such suspension was consistent with the provisions of the LOSC. Article 19(1) of the LOSC states that: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."⁷⁵

⁷² Ibid art 13(1).

⁷³ Ibid art 17.

⁷⁴ Donald R Rothwell, 'Coastal State Sovereignty and Innocent Passage: The Voyage of the *Lusitania Expresso*' (1992) 16(6) *Marine Policy* 427, 427-8.

⁷⁵ LOSC, art 19(1).

In a letter from the Permanent Representative of Indonesia to the United Nations to the UN Secretary General, Indonesia argued that:

Far from being a voyage of peace and of respect for human rights, it was politically motivated from the start, aimed at instigating confrontation, aggravating tension, including divisiveness and inciting disturbances in East Timor. For these reasons, the voyage was prejudicial to the peace, good order and security of Indonesia, and thus contrary to the established notions of innocent passage.⁷⁶

Regarding the suspension of the right of innocent passage, article 25(3) of the LOSC makes it clear that:

The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.⁷⁷

The question is whether the suspension of the right of innocent passage of a single vessel is discrimination within the context of article 25(3) of LOSC. Rothwell argues that even if “the intended voyage of the *Lusitania Expresso* could...be considered to constitute a threat to Indonesia’s internal security, how is it possible for Indonesia to justify suspension of innocent passage for a single vessel?”⁷⁸ In response to this suspension, Portugal issued a diplomatic statement which asserted that Indonesia has used force to deny the right of innocent passage of the *Lusitania Expresso*.⁷⁹

⁷⁶ Annex to Letter dated 8 April 1992 written by the Permanent Representative of Indonesia to the United Nations to the Secretary General of the United Nations, UN Doc No A/47/152, 8 April 1992, paras 2-4 quoted in Rothwell, above n 74, 428.

⁷⁷ LOSC, art 25(3).

⁷⁸ See Rothwell, above n 74, 435.

⁷⁹ Ibid 429.

Nevertheless, Indonesia did suspend the passage of the Portuguese vessel and there were no further disputes lodged in relation to this case.

In conclusion, as both Act No.6/1996 and Government Regulation No.36/2002 are silent on the issue of innocent passage of foreign warships, it can be assumed that neither prior notification nor prior authorisation is required. Thus, Indonesia's domestic legislation is generally consistent with the provisions of the LOSC with regard to the innocent passage of foreign warships.

5.2.5 The Philippines

The Philippines is also an archipelagic State bordering the South China Sea. Indeed, it is entirely surrounded by sea and consists of 7,107 islands.⁸⁰ The Philippines is the world's second largest archipelagic State after Indonesia. In 1898, Spain ceded the Philippines to the United States by the Treaty of Paris of 10 December 1898, and doing so set the boundary limits for the Philippine Islands.⁸¹ These boundary limits were then supplemented by the Treaty between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines 1900⁸², and by the Convention between the United States and Great Britain Delimiting the Boundary between the Philippine Archipelago and the State of North Borneo 1930.⁸³ These instruments provide that the Philippine Archipelago "comprehends the Philippine

⁸⁰ *Geography of the Philippines* Philippine Islands <http://www.philippine-islands.ph/en/geography_of_the_philippines.html>

⁸¹ See article 3 of the *Treaty of Peace Between the United States and Spain; December 10, 1898* <http://avalon.law.yale.edu/19th_century/sp1898.asp>.

⁸² *Treaty between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines* The LawPil Project <<http://www.gov.ph/1900/11/07/the-philippine-claim-to-a-portion-of-north-borneo-treaty-between-the-kingdom-spain-and-the-united-states-of-america-for-cession-of-outlying-islands-of-the-philippines-1900/>>.

⁸³ *Convention between the United States and Great Britain Delimiting the Boundary between the Philippine Archipelago and the State of North Borneo* <<http://www.gov.ph/1932/12/15/convention-between-the-united-states-of-america-and-great-britain-delimiting-the-boundary-between-the-philippine-archipelago-and-the-state-of-north-borneo-1930/>>.

Islands described as the archipelago in Article III of the Treaty of Paris, with the addition of the islands included by the two companion treaties referred to above.”⁸⁴ In 1961 the Philippines enacted The Philippine Baselines Law, known as Republic Act No. 3046 of 17 June 1961 (Act No. 3046). It states that “the baselines from which the territorial sea of the Philippines is determined consist of straight lines joining appropriate points of the outermost islands of the archipelago”⁸⁵, and “all waters within the baselines provided for in Section one hereof are considered inland or internal waters of the Philippines.”⁸⁶ Act No. 3046 also affirmed that “all the waters beyond the outermost islands of the archipelago but within the limits of the boundaries set forth in the aforementioned treaties comprise the territorial sea of the Philippines.”⁸⁷ The boundaries set forth in these treaties (international treaty limits) encompass a huge maritime area measuring 600 miles in width and 1200 miles in length - far more than the 12 nautical mile territorial sea limit specified in the LOSC.⁸⁸ After the passing of Act No. 3046 a number of States, including the United States, the United Kingdom and Australia, made formal protests to the Philippine Government regarding (among other matters) the passage of foreign warships through the territorial sea claimed by the Philippines.⁸⁹

The current 1987 Constitution of the Philippines defines the national territory as:

The Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of

⁸⁴ Merlin M. Magallona, 'A Framework for the Study of National Territory: A Statement of the Problem' (2008) 33(2) *IBP Journal* 1, 2.

⁸⁵ *Republic Act No. 3046* <http://www.lawphil.net/statutes/repacts/ra1961/ra_3046_1961.html>.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Lowell Bautista, 'The Philippine Treaty Limits and Territorial Water Claim in International Law' (2009) 5(1/2) *Social Science Diliman* 107, 109.

⁸⁹ D. P. O'Connell, 'Mid-Ocean Archipelagos in International Law' (1971) 45 *British Yearbook of International Law* 1, 60.

its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.⁹⁰

The Philippine archipelago referred to in this Constitution includes all islands in the above mentioned treaties. As a result, all waters “around, between, and connecting the islands of the archipelago” are considered internal waters.

During UNCLOS III, the Philippine delegation were at pains to emphasise the unique nature of the State’s international treaty limits and pleaded for recognition of its territorial sea on the basis of historic and legal title. Even so, the Philippine proposal was not included in the draft of the negotiating texts.⁹¹ On 10 December 1982, at the final session of UNCLOS III, the head of Philippine delegation Mr Tolentino stated that: “we would really have some problem with the 12-mile limit on breadth of the territorial sea provided in this Convention. My Government has studied the problem; it is a very difficult one for us.”⁹² He then went on to add that “when we sign the Convention we shall submit also a declaration in exercise of the right granted under article 310.”⁹³

Upon signing the LOSC on 10 December 1982, and in accordance with its earlier pronouncement, The Philippines made the following Statement:

⁹⁰ National Territory, 1987 Philippine Constitution; see also Magallona, above n 1.

⁹¹ See Lowell Bautista, 'Philippine boundaries: internal tensions, colonial baggage, ambivalent conformity' (2011) 16(December) *Journal of Southeast Asian Studies* 35, 44; see also statement made by Tolentino at the 189th Plenary Meeting, UN Doc A/CONF.62/SR.189

< http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-189.pdf>.

⁹² UN Doc A/CONF.62/SR.189.

⁹³ Ibid.

1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines.

2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930.⁹⁴

The purpose of this Statement was to make it clear that, following ratification of the LOSC, the Philippines had no intention of harmonising its domestic legislation with the provisions of the LOSC. The Philippines also declared that:

The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation.⁹⁵

With this statement, the Philippines refused to make a distinction between archipelagic waters and internal waters, effectively removing the rights of transit passage and archipelagic passage provided for in the LOSC.⁹⁶

Thus, for the Philippines, all waters landward of its baselines are internal waters, and all waters seaward of its baselines to the outermost boundaries of the aforementioned treaties constitute the territorial sea (see figure 5.1). With the contradictions that exist between the LOSC, the State's constitutional documents, as well as its domestic legislation, the Philippines has faced difficulties in implementing

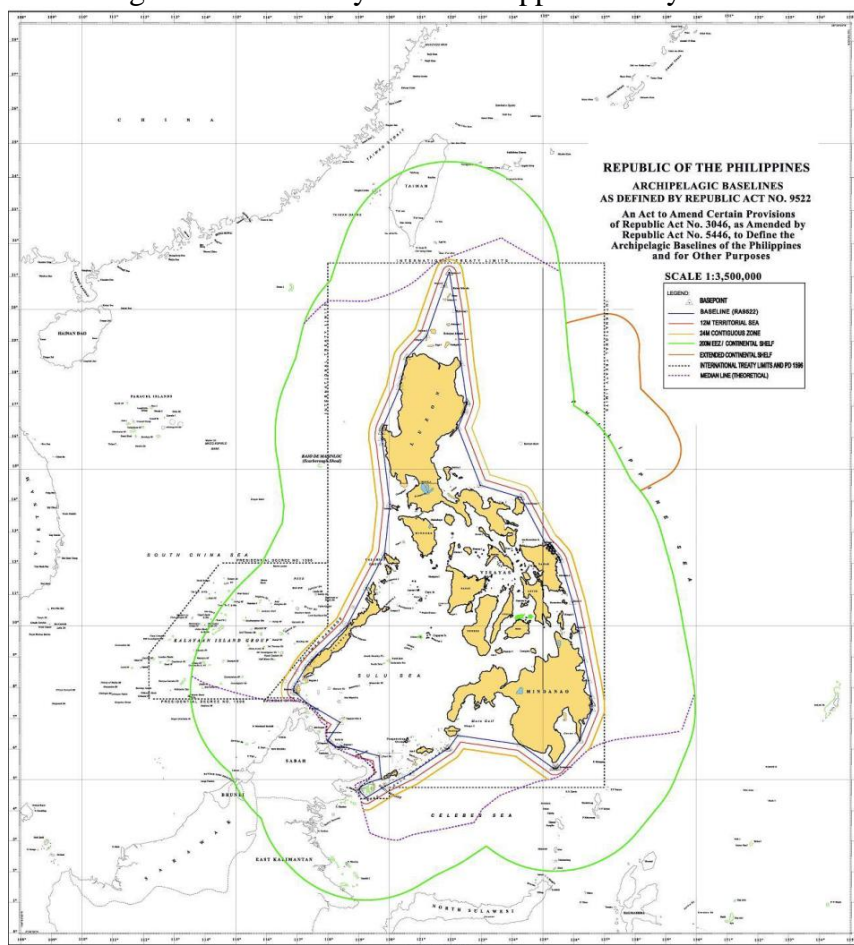
⁹⁴ Sea Statement upon Signature and Ratification of the Philippines at above n 20.

⁹⁵ Ibid.

⁹⁶ See Lowell B Bautista, 'International legal implications of the Philippines Treaty Limits on navigational rights in Philippine waters' (2009) 1(3) *Australian Journal of Maritime and Oceans Affairs* 88, 90-1.

the LOSC after becoming a party to the Convention. In 2009, the Philippines passed the Baselines Law (Act No. 9522) - “an Act to amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to define the Archipelagic Baselines of the Philippines, and for Other Purposes.” However, this new Baselines Law “is a mere clinical and technical adjustment of the base points under the old Baselines Law” , and does not change the character of the waters under Act No. 3046/ Act No. 5446.⁹⁷

Figure 5.1 Boundary of the Philippine Treaty Limits



Source: Lowell B. Bautista, ‘Philippine Territorial Boundaries: International Tensions, Colonial Baggage, Ambivalent Conformity’ (2011) 16 (December) *Journal of Southeast Asian Studies*

⁹⁷ See Henry S. Bensurto, *Archipelagic Philippines: A Question of Policy and Law* <<http://www.virginia.edu/colp/pdf/Bali-Bensurto.pdf>>.

Regarding the passage of foreign warships in the territorial sea, there have been no domestic laws or regulations directly addressing this issue. However, in practice, the Philippines requires prior notification or authorisation for the passage of foreign warships through its territorial sea.⁹⁸ In 1965, Australia and the Philippines reached an agreement whereby the Australian Defence Attaché would inform the Philippines Navy “at low level” of the passage of its naval vessels through the territorial sea of the Philippines.⁹⁹ Three years later, and in response to the passage of combined units of British and Australian naval vessels through the territorial sea claimed by the Philippines, the Department of Foreign Affairs of the Philippines stated that:

...the...combined units of British and Australian armed public vessels, or any other armed foreign public vessel for that matter, cannot assert or exercise the so-called right of innocent passage through the Philippine territorial sea without the permission of the Philippine Government.¹⁰⁰

The Philippines also restricts the passage of nuclear cargo vessels through its territorial sea.¹⁰¹ According to the Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990 (Act No.6969 of 1990), the Philippines “prohibit the entry, even in transit, of hazardous and nuclear wastes and their disposal into the Philippine territorial limits for whatever purpose.”¹⁰² This requirement is inconsistent with the provisions of the LOSC, which state that nuclear cargo ships have the right of innocent passage through the territorial sea of a foreign state provided they “carry documents and observe

⁹⁸ Ibid, 92, see also Jorge R Coquia, 'Development of the Archipelagic Doctrine as a Recognized Principle of International Law' (1983) 58 *Philippine Law Journal* 13, 32.

⁹⁹ O'Connell, above n 89, 33.

¹⁰⁰ See the aide-mémoire to the British Embassy of 23 September 1968, cited in *ibid* 34.

¹⁰¹ Stuart Kaye, *Freedom of Navigation in Indo-Pacific Region*, Papers in Australian Maritime Affairs No 22 (Sea Power Centre, 2008) 14.

¹⁰² See *Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990* The LawPhil Project <http://www.lawphil.net/statutes/repacts/ra1990/ra_6969_1990.html>.

special precautionary measures established for such ships by international agreement.”¹⁰³

In summary, the current domestic laws and regulations of the Philippines are inconsistent with the LOSC insofar as the territorial sea and innocent passage regime are concerned. As a party to the LOSC, the Philippines should seek to harmonise its domestic legislation by bringing it into conformity with the provisions of the LOSC.

5.2.6 Malaysia

Malaysia signed the LOSC on 10 December 1982, with ratification of the Convention taking place on 14 October 1996.¹⁰⁴ One of the State’s earlier territorial sea-related instruments was the Emergency Ordinance No.7/1969. According to this Ordinance, the breadth of Malaysia’s territorial waters was 12 nautical miles. However, the Ordinance did not mention the baselines from which the territorial sea was to be measured.¹⁰⁵ In 1984, Malaysia claimed an exclusive economic zone by virtue of the Exclusive Economic Zone Act 1984 (Act No. 311), which entered into force on 1 May 1985. This Act defined the territorial sea as “the territorial waters of Malaysia determined in accordance with the Emergency (Essential Powers) Ordinance No.7/1969”¹⁰⁶, and affirmed that Malaysia’s EEZ extends to a distance of 200 nautical miles from the baselines from which the breath of the territorial sea is measured.¹⁰⁷ Again, Malaysia did not formally declare its baselines. On 1 May 2007, Malaysia enacted the Baselines of Maritime Zones Act 2006, formally declaring that the baselines

¹⁰³ LOSC, art 23.

¹⁰⁴ See *Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014* <http://www.un.org/depts/los/reference_files/status2010.pdf>.

¹⁰⁵ See *Emergency (Essential Powers) Ordinance, No. 7, 1969* <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1969_Ordinance.pdf>.

¹⁰⁶ See *Exclusive Economic Zone Act, 1984, Act No. 311* <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf>.

¹⁰⁷ Ibid art 3(1).

used for determining the State's maritime zones include normal baselines and straight baselines.¹⁰⁸ However, this Act provides no geographical coordinates of base points, instead stating that: "[The] Yang di-Pertuan Agong, on the recommendation of the Minister may, by order published in the Gazette, declares the geographical coordinates of base points from which the baselines of Malaysia may be determined."¹⁰⁹ It may be assumed from this statute that Malaysia prefers to preserve the status quo, without declaring coordinates for its baselines.¹¹⁰ It is interesting to note that on the maps appended to the Executive Summary of the 2009 Malaysia-Vietnam Joint Submission to the United Nations Commission on the Limits of the Continental Shelf, it can be seen that Malaysia employs straight baselines for the purpose of this joint submission. However, no official list of coordinates for these baselines has been submitted to the United Nations.¹¹¹ The Emergency Ordinance No.7/1969 ceased to have effect in 2012, and Malaysia enacted the Territorial Sea Act 2012 on 22 June 2012 to replace it. The object of this Act is "to provide for the territorial sea of Malaysia and for connected matters."¹¹² It reaffirms the breadth of the territorial sea, which is 12 nautical miles from the baselines established in accordance with the Baselines of Maritime Zones Act 2006. However, this Act again does not provide geographical coordinates of base points.

Malaysia's domestic laws do not mention the passage of foreign warships in its territorial sea. The only article of the Territorial Sea Act 2012 referring to Malaysia's

¹⁰⁸ See *Baselines of Maritime Zones Act 2006*
<http://www.agc.gov.my/Akta/Vol.%2014/Act%20660.pdf>.

¹⁰⁹ Ibid section 4(1).

¹¹⁰ See Sam Bateman and Clive Schofield, 'State Practice Regarding Straight Baselines in East Asia- Legal, Technical and Political Issues in a Changing Environment.' (Paper presented at the Difficulties in Implementing the Provisions of UNCLOS, International Hydrographic Bureau, Monaco, 16-17 October 2008).

¹¹¹ See *Executive Summary, Joint submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf* (3 May 2011)

http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

¹¹² See *Territorial Sea Bill 2012*

http://www.shariahlaw.com/files/bills/pdf/2012/MY_FS_BIL_2012_13.pdf.

sovereignty in respect of the territorial sea is article 4, which states that: “The sovereignty in respect of the territorial sea, and in respect of its bed and subsoil, is vested in and exercisable by the Yang di-Pertuan Agong in right of Malaysia.”¹¹³ However, upon ratification of the LOSC, Malaysia made a declaration regarding innocent passage:

In view of the inherent danger entailed in the passage of nuclear-powered vessels or vessels carrying nuclear material or other material of a similar nature and in view of the provision of article 22, paragraph 2, of the Convention on the Law of the Sea concerning the right of the coastal State to confine the passage of such vessels to sea lanes designated by the State within its territorial sea, as well as that of article 23 of the Convention, which requires such vessels to carry documents and observe special precautionary measures as specified by international agreements, the Malaysian Government, with all of the above in mind, requires the aforesaid vessels to obtain prior authorization of passage before entering the territorial sea of Malaysia until such time as the international agreements referred to in article 23 are concluded and Malaysia becomes a party thereto...¹¹⁴

This statement is inconsistent with Article 23 of the LOSC. Indeed, while Article 23 requires foreign nuclear-powered ships and other ships with inherently dangerous or noxious cargo to carry documents and observe special precautionary measures, it does not require such vessels to obtain prior authorisation from the coastal State.¹¹⁵ Given that most nuclear-powered vessels are sovereign immune vessels, this statement, if fully enforced, would affect the innocent passage of foreign sovereign immune vessels in Malaysia’s territorial sea. However, as there are no provisions on the innocent passage of foreign sovereign immune vessels in Malaysia’s domestic

¹¹³ Ibid art 4.

¹¹⁴ See Declaration Upon Ratification of Malaysia 14 October 1996, above n 20.

¹¹⁵ See LOSC, art 23.

legislation, this statement alone might not be of sufficient legal force to exclude the innocent passage of foreign nuclear-powered vessels in Malaysia's territorial sea.

In summary, there are also no provisions in Malaysia's domestic legislation that clearly address the innocent passage of foreign vessels in the State's territorial sea. In order to implement the LOSC fully, Malaysia needs to establish its baseline system and promulgate, through domestic laws and regulations, detailed provisions regarding the innocent passage regime in its territorial sea.

5.2.7 Brunei

Brunei has a coastline length of only 161km.¹¹⁶ It gained full independence on 1 January 1984, having been a British protected State since 1888.¹¹⁷ Brunei signed the LOSC on 5 December 1984 and ratified it on 5 November 1996.¹¹⁸ It made no declaration on either signature or ratification to the LOSC. In the Territorial Waters of Brunei Act 1982, Brunei declared the breadth of its territorial waters as 12 nautical miles; however, as with Malaysia, it has not provided the baseline system from which its territorial sea can be measured.¹¹⁹ None of the State's domestic laws or regulations mention innocent passage. There have been no incidents regarding innocent passage of foreign vessels in Brunei's territorial sea. Thus, it could be argued that Brunei's practice has been consistent with the LOSC.

¹¹⁶ *Geography of Brunei Darussalam* Commonwealth Governance

<http://www.commonwealthgovernance.org/countries/asia/brunei_darussalam/geography/>.

¹¹⁷ See *Brunei Darussalam : History* The Commonwealth <<http://thecommonwealth.org/our-member-countries/brunei-darussalam/history>>

¹¹⁸ See United Nations, *Treaty Collection*

<https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en>.

¹¹⁹ Article 16 of the LOSC requires States to either publish their baselines on charts or provide a list of geographical coordinates of base points to the United Nations; See LOSC, art 16; See also *Territorial Waters of Brunei Act, 1982*

<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRN_1982_Act.pdf>.

5.3 Political security and strategic factors that have influenced State practice

It can be seen from the above discussion that political security and strategic factors have heavily influenced the development of domestic legislation of South China Sea littoral States on the innocent passage regime.

Since the 19th century, China has been “invaded” by Western powers and Japan on a number of occasions, with most of these invasions having come from the sea.¹²⁰ After the founding of the People's Republic of China on October 1, 1949, there have allegedly been many foreign “intrusions” into China’s territorial waters which were condemned by China as violations of the State’s territorial integrity and sovereignty.¹²¹ According to Zou Keyuan, the requirement of prior authorisation for the passage of foreign warship through China’s territorial sea was “triggered by the frequent intrusions by American warships.”¹²² Hungdah Chiu has highlighted that in the 1963 alone China issued 15 “serious warnings” to the United States for alleged intrusions of its warships into China’s territorial sea.¹²³ As China’s maritime defence capabilities were weak at the time, security concerns were perhaps the driving force behind China instituting the prior authorisation requirement for the passage of foreign warships in its 1958

¹²⁰ Keyuan, above n 2, 81. In the First Opium War between Great Britain and China (1839-1842), China was defeated in a series of naval conflicts. As a result, the British were in a position to make a large number of demands from the weaker Qing Government of China in the Anglo-Chinese Treaty of Nanjing. It was under this Treaty that China ceded the island of Hong Kong to the British. In the Second Opium War (1857–1858), Britain attacked the Chinese port cities of Guangzhou and Tianjin. In the wake of these attacks, France, Russia and the United States signed treaties with China at Tianjin in quick succession in 1858. Under the most-favoured-nation clause, all of the foreign powers operating in China were permitted to seek the same concessions of China that Great Britain had earlier achieved by force. On 22 August 1894, in a significant naval encounter between France and China, the Chinese flag ship was sunk, all other Chinese ships were set on fire and 500 Chinese sailors were killed. Being defeated in the Sino-Japanese War of 1894-1895, China had to sign the treaty of Shimonoseki in which China recognised the independence of Korea and ceded the Liaodong Peninsula, the islands of Taiwan, as well as Penghu to Japan. For more information, see Philip Jowett, *China's Wars: Rousing the Dragon 1894-1949* (Osprey Publishing, 2013), 20-36; see also *Opium Wars*, Global Security, <<http://www.globalsecurity.org/military/world/war/opium-wars.htm>>.

¹²¹ Keyuan, above n 5, 212.

¹²² Ibid.

¹²³ Hungdah Chiu, 'China and The Question Of Territorial Sea' (1975) 1(1) *Maryland Journal of International Law* 29, 57.

Declaration. Another political factor at play was that, as a socialist State, China chose to support the Soviet Union and other socialist States which, at that time, required prior authorisation for the passage of foreign warships through their territorial sea.¹²⁴ During and after UNCLOS III, China's position on the innocent passage of foreign warships was essentially the same as in its 1958 Declaration, while the Soviet Union's views on the innocent passage of foreign warships were in transition, with a change occurring in 1989 following the signing of a joint statement with the United States titled *Uniform Interpretation of the Rules of International Law Governing Innocent Passage*.¹²⁵ As Zou Keyuan has observed, the traditionally sensitive security concerns of China (and particularly the State's painful history of having been repeatedly attacked from the sea), made China reluctant to grant foreign warships the right of innocent passage in its territorial sea without prior authorisation.¹²⁶ When China ratified the LOSC in 1996, it made a statement to the effect that foreign warships must "obtain advance approval from or give prior notification" for their passage through China's territorial sea.¹²⁷ The additional alternative requirement of "prior notification" to the original position of "prior authorisation" reflects a change in China's attitude towards the innocent passage

¹²⁴ Keyuan, above n 2, 81; Upon signing the Territorial Sea Convention, the Soviet Union made a reservation in which it stipulated that "[t]he Government of the USSR considers that a coastal state has the right to establish an authorization procedure for the passage of foreign warships through its territorial waters."

< https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&lang=en>.

¹²⁵ Lawrence Juda, 'Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine' (1990) 21(1) *Ocean Development & International Law* 111, 113. According to the joint statement: "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."

¹²⁶ Keyuan, above n 2, 81.

¹²⁷ See Statement upon Ratification of China, *Declarations and Statements* (29 October 2013) United Nations

<http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>.

of warships.¹²⁸ Throughout history, the United States and the former Soviet Union have both altered their positions on the innocent passage of warships. This has occurred in response to a changing security landscape as well as the enhancement of the maritime defence capabilities of these two powers.¹²⁹ With the rapid growth of China's naval power, Chinese naval ships will undoubtedly need to sail through the territorial seas of other States. For the benefit of its navy, therefore, China may need to change its position on the innocent passage of foreign warships through the territorial sea. Sienho Yee has argued that if China chooses not to abide by international law rules, in the future "China may find itself in a straightjacket that it has helped to make but from which it cannot free itself."¹³⁰ According to Zou Keyuan, although China is in a position to bring its domestic law into line with the LOSC, such action will certainly take some time.¹³¹

Taiwan, on the other hand, was not allowed to participate in UNCLOS III and thus could not become a party to the LOSC. As previously mentioned, Taiwan is a small island which China has claimed as its province. As a result, maritime security has always been an significant concern for Taiwan, especially with the rise of China as a formidable maritime power. In order to provide its navy with full access to the blue waters of the Pacific Ocean, China is attempting to encircle and control Taiwan.¹³²

¹²⁸ Keyuan, above n 5, 214.

¹²⁹ During 1930s, the Soviet Union was of the view that warships *did* have the right of innocent passage through the territorial sea, while the US position was that foreign warships were required to obtain prior authorisation from the coastal State. During UNCLOS I, the two States reversed their positions, and finally in 1989 their positions became congruent with the signing of a joint statement on a Uniform Interpretation of the Rules of International Law Governing Innocent Passage; see Erik Franckx, 'Innocent passage of warships: Recent developments in US-Soviet relations' (1990) (November) *Marine Policy* 484, 485-88.

¹³⁰ Sienho Yee, 'Sketching the Debate on Military Activities in the EEZ: An Editorial Comment' (2010) *Chinese Journal of International Law* 1, 5.

¹³¹ Keyuan, above n 5, 215.

¹³² Daniel Schaeffer, 'The South China Sea: A Piece in Global Naval Encirclement Strategy of Taiwan by Mainland China' in Yann-huei Song and Zou Keyuan (eds), *Major Law and Policy Issues in the South China Sea: European and American Perspectives* (Ashgate Publishing, 2014) 247.

Taiwan is not bound by the LOSC, and with its fear of being invaded by China, it is unlikely that Taiwan will change its position regarding the innocent passage of foreign warships and government vessels through its territorial sea.

Security concerns have also featured prominently in Vietnam's approach to the innocent passage regime. During UNCLOS III, Vietnam was enjoying its status as a newly independent State, having long struggled for unification. The importance of security for Vietnam was reflected in its 1977 Statement in which it claimed "security" as a function of the contiguous zone.¹³³ By using the straight baseline system and claiming the contiguous zone for security purposes, Vietnam has created a maritime security buffer zone that, in some areas, extends to more than 100 nautical miles from its coast.¹³⁴ Like other socialist States at the time, particularly the Soviet Union and China, Vietnam did not recognise the innocent passage of foreign warships in its territorial sea. In 1980, Vietnam issued Decree No.30-CP which requires foreign warships to obtain prior authorisation before entering Vietnam's contiguous zone.¹³⁵ Throughout UNCLOS III the Soviet Union, as a major ally of Vietnam, shifted its position to support the innocent passage of warships, while China –which at that time was perceived by Vietnam as a potential aggressor, supported a restrictive doctrine that required foreign warships to obtain prior authorisation from coastal States before passing through their territorial sea. Vietnam found itself in a difficult political situation that ultimately resulted in its decision to remain silent on this issue.¹³⁶ On 10 December 1982, at the final session of UNCLOS III, the head of the Vietnamese delegation Mr Kim Chung stated that: "Although we are not entirely satisfied with certain provisions

¹³³ See Farrell, above n 47, 54.

¹³⁴ Ibid 56.

¹³⁵ Ibid 82; see also Vietnam's Decree No. 30-CP on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones (29 January 1980).

¹³⁶ Farrell, above n 47, 83.

of the Convention, my delegation willingly subscribes to the global compromise and the method for the overall settlement of all law-of-the-sea problems.”¹³⁷ Unfortunately, Mr Chung did not clarify which of these “certain provisions” he was referring to.

With the changing security environment in the South China Sea, especially “China’s new wave of aggressive assertiveness in the [region]”¹³⁸, Vietnam enacted the Law of the Sea of Vietnam in 2012 in an attempt to bring its domestic legislation in line with the provisions of the LOSC. As Duong Danh Huy has observed, “the more this Vietnam Maritime Law complies with the provisions of UNCLOS, the more convenient the international support for Vietnam will be.”¹³⁹ However, regarding the innocent passage regime, Vietnam still requires prior notification for the passage of foreign warships in its territorial sea – a stance inconsistent with the LOSC. It took Vietnam more than 20 years (from 1980 to 2012) to change its position from prior authorisation to prior notification for the innocent passage of foreign warships; therefore, it is hard to predict whether Vietnam will modify its Law of the Sea 2012. However, Vietnam’s response to the USS *Curtis Wilbur* incident may hint at the State’s future direction on this point. As previously mentioned, the USS *Curtis Wilbur* was a U.S. Navy destroyer which, in January 2016, exercised innocent passage within 12 nautical miles of Triton Island claimed by China, Vietnam and Taiwan without giving prior notice to any of these claimant States. In responding to the incident, Vietnamese Foreign Ministry spokesman Le Hai Binh proclaimed that: “Vietnam respects the right of innocent

¹³⁷ See the statement made by Mr Kim Chung at the 191st Meeting, UN Doc. A/CONF.62/SR.191 <http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-191.pdf>.

¹³⁸ See detail in Carlyle A Thayer, ‘China’s New Wave of Aggressive Assertiveness in the South China Sea’ (2011) 2(3) *International Journal of China Studies* 555, 555-583

¹³⁹ Cited in Phan Trong Quynh, *Legal fight over the East Sea* (10 July 2012) VUSTA <<http://vusta.vinades.net/en/news/Vietnam-s-sovereignty/Legal-fight-over-the-East-Sea-44706.html>>.

passage through its territory in accordance with international law, particularly Article 17 of the Law of the Sea Convention.”¹⁴⁰

For Indonesia, a State comprising thousands of islands with various ethnic groups, coupled with the State’s vast maritime estate and tumultuous colonial past, it is axiomatic that national security and political stability were at the fore of Indonesia’s agenda at UNCLOS III.¹⁴¹ Indeed, the Indonesian delegate to UNCLOS III expressed the view that:

Any Law of the Sea Conference must recognize the need for, and ensure the achievements of national unity, political stability, economic and social development, as well as the safeguard of national defence and security of an archipelagic state like Indonesia.¹⁴²

Decree No.16 of 1971, which required foreign warships passing through Indonesian waters to obtain security clearance from the Minister of Defence and Security, reflected the State’s deep concern over maritime security at the time. However, after becoming a party to the LOSC in 1985, Indonesia’s domestic legislation remained silent on the innocent passage of foreign warships in its territorial sea and archipelagic waters. Perhaps the new concept of the archipelagic State (which had finally been incorporated in the LOSC) took into account Indonesia’s national interests, and therefore Indonesia was predominantly satisfied with the LOSC. In a statement made on behalf of the Indonesian delegation at the final session of UNCLOS III, Mr Kusumaatmadja asserted that: “We believe that the present text is the maximum that

¹⁴⁰ Quoted in Viet Anh, *Vietnam Respects Innocent Passage of U.S Ship in the Paracel Islands* (31 January 2016) Vnexpress <<http://vnexpress.net/tin-tuc/the-gioi/viet-nam-ton-trong-quyen-di-quua-vo-hai-cua-tau-my-o-hoang-sa-3350816.html>>.

¹⁴¹ Hasjim Djalal, *Indonesia and the Law of the Sea* (Centre for Strategic and International Studies, 1995) 178.

¹⁴² Ibid 179.

could be achieved by the whole community. Each and every one of us has made concessions to achieve a universally acceptable Convention.”¹⁴³

Unlike Indonesia, the Philippines faced difficulty in attempting to harmonise its Constitution with LOSC provisions on the limits of the territorial sea. Indeed, such difficulty was encountered despite the Philippines being content with the new concept of the archipelagic State. As a result, the Philippines made statements both on its signature to, and ratification of, the LOSC, and which were earlier found to be inconsistent with the Convention. The seeming contradictions that exist between the State’s domestic legislation and the LOSC have been a major obstacle for the Philippines in implementing the LOSC. In 2009, the Philippines enacted its new Baselines Law, which represented an attempt to harmonise its domestic law with the LOSC. However, this law created controversy between the Government and Philippines petitioners on the basis that it violated the Philippine Constitution. Based on the view that the 2009 Baselines Law is only a statutory mechanism for the Philippines to delimit its maritime zone, and plays no role in the acquisition or loss of territory, the Supreme Court of the Philippines has already declared that the 2009 Baselines Law is constitutional.¹⁴⁴ As the Supreme Court is the final arbiter of the law in the Philippines legislative hierarchy, it is clear that the 2009 Baselines Law will be enforced. The Supreme Court also commented that:

Absent an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. This is a recipe for a

¹⁴³ See the statement made by Mr. Kusumaatmadja, UN Doc. A/CONF.62/SR.186 <http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-186.pdf>.

¹⁴⁴ See the decision of the Philippine Supreme Court at *G.R No. 187167* (11 October 2014) Lawphil Project <http://www.lawphil.net/judjuris/juri2011/aug2011/gr_187167_2011.html>.

two-fronted disaster: first, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and second, it weakens the country's case in any international dispute over Philippine maritime space.¹⁴⁵

In light of the above pronouncement, it is clear that the 2009 Baselines Law is intended to garner international support for the State's national security, as well as its interest in the escalating territorial disputes with neighbouring States in the South China Sea.

In the case of Malaysia and Brunei, the domestic regulations of both States are silent on the passage of foreign warships. As discussed above, these States have declared a 12 nautical mile territorial sea; however, neither Malaysia nor Brunei has publicised the baselines from which their territorial seas are measured. Compared to other South China Sea littoral States, maritime disputes are a less urgent concern for these two States, as no incidents have occurred in relation to the innocent passage of foreign sovereign immune vessels in their territorial seas. For this reason, it is unclear when Malaysia or Brunei will pass domestic regulations on the innocent passage regime.

5.4 Conclusion

The text of the LOSC makes it clear that "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."¹⁴⁶ After the entry into force of the LOSC, the littoral States of the South China Sea enacted domestic legislation in order to implement the provisions of the LOSC. However, when it comes to the passage of sovereign immune vessels in the territorial sea of coastal

¹⁴⁵ Ibid.

¹⁴⁶ LOSC, art 17.

States, the practice of South China Sea littoral States remains divergent and inconsistent with the LOSC. The table below summarises the domestic regulations and practices of South China Sea littoral States regarding the innocent passage of foreign warships in their territorial seas.

Table 5.1 Innocent Passage of Foreign Warships: the Practice of South China Sea littoral States

States	Domestic regulations
Brunei	Current domestic regulations do not refer to the innocent passage of foreign military vessels.
China	Foreign warships are required to obtain prior authorisation.
Indonesia	Current domestic regulations do not refer to the innocent passage of foreign military vessels.
Malaysia	Current domestic regulations do not refer to the innocent passage of foreign military vessels.
The Philippines	No domestic regulations in place, but in practice foreign warships are required to give prior notification or obtain prior authorisation.
Taiwan	Foreign military and government vessels are required to give prior notification.
Vietnam	Foreign military vessels are required to give prior notification.

The provisions of the LOSC dealing with maritime zones and navigation regimes are widely recognised as reflecting customary international law, and are thus binding on all states.¹⁴⁷ Indeed, the text of the LOSC clearly provides that ships of all States enjoy the right of innocent passage through the territorial sea. Therefore, the passage of warships should not represent an exception. As parties to the LOSC, South

¹⁴⁷ See R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 1999) 24; Rob McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea* (Martinus Nijhoff, 2002) 101; see also D. H. Anderson, 'Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea' (1995) 44(2) *International and Comparative Law Quarterly* 313, 320.

China Sea littoral States should harmonise their domestic legislation with the provisions of the LOSC in accordance with the international legal principle of *pacta sunt servanda*,¹⁴⁸ as codified in the Vienna Convention on the Law of Treaties.¹⁴⁹ As discussed above, political security and strategic factors have heavily influenced the practice of South China Sea States. The degree to which these factors have impacted policy decisions will, of course, vary from State to State. In the interest of political stability and safe navigation in the South China Sea, some States may choose to adjust their domestic laws and regulations to ensure consistency with the LOSC. However, this will inevitably take some time and will be subject to changes in the security environment.¹⁵⁰

¹⁴⁸ *Pacta sunt servanda* is the international law principle which indicates that international treaties should be upheld by all parties in good faith; see The United Nations, *Vienna Convention on the Law of Treaties*, adopted 22 May 1969 (entered into force 27 January 1980), art 26.

¹⁴⁹ Article 26 of the Vienna Convention on the Law of Treaties states that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”; see *Vienna Convention on the Law of Treaties*, 148.

¹⁵⁰ Part of this Chapter was published in the Asia Pacific Journal of Ocean Law and Policy as Anh Duc Ton, ‘Innocent Passage of Warships: International Law and the Practice of East Asian Littoral States’ (2016) 1(2) *Asia Pacific Journal of Ocean Law and Policy*, 210.

6 COASTAL STATE PRACTICE IN IMPLEMENTING NAVIGATIONAL REGIMES IN THE EXCLUSIVE ECONOMIC ZONE

6.1 Introduction

As discussed in Chapter Four, the exclusive economic zone (EEZ) was one of the newer concepts to be introduced in the LOSC. Indeed, it is considered a compromise between the divergent interests of coastal States on the one hand and major maritime States on the other. The LOSC defines the EEZ as a separate functional zone of a *sui generis* character, with neither residual territorial sea characteristics nor residual high seas characteristics.¹ Coastal States have sovereign rights over living and non-living resources of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, as well as other economic activities related to economic exploration and exploitation of the zone (such as the production of energy from water, current and wind).² Article 56 of the LOSC also makes it clear that within the EEZ, coastal States have jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.³ In addition to the jurisdictional rights mentioned above, the regime of the high seas also applies. In this regard, all States enjoy the freedoms of navigation and overflight, as well as the freedom to lay submarine cables and pipelines referred to in Article 87 and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft [etc].”⁴

However, in practice, States have different interpretations of the provisions of the LOSC regarding the EEZ regime. One of the most controversial issues in implementing the EEZ regime has been the legality of foreign military activities in the

¹ R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 1999) 165.

² LOSC, art 56.

³ LOSC, art 56.

⁴ LOSC, arts 58 & 87.

zone. South China Sea coastal States tend to regulate (and sometimes even restrict) activities of foreign military vessels and aircraft in their EEZ, while maritime user States consider military activities to be included in the freedoms of navigation and overflight granted by article 87 of the LOSC.

As discussed in Chapters Two and Three, the South China Sea is not only important for merchant shipping, but also for military transits and operations. Indeed, maintaining the safety and freedom of navigation and overflight in the South China Sea are key strategic interests for many States. Given that the majority of waters in the South China Sea are within EEZs claimed by coastal States, the different interpretations of the EEZ regime, together with the prevailing uncertainty over EEZ boundaries, have resulted in a number of maritime disputes and confrontations in the area. Against this backdrop, the objectives of this chapter are to: (i) analyse the practice of littoral States in implementing the navigational regime of the LOSC in the EEZ; (ii) outline the ambiguous nature of EEZ maritime claims in the South China Sea; and (iii) discuss future prospects for the passage of sovereign immune vessels and aircraft in this maritime region.

6.2 The practice of coastal States

6.2.1 China

Although China signed the LOSC in 1982, it was not until 1996 (and upon ratification of the Convention), that China made its first statement on the EEZ. According to this statement, China “shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.”⁵ Two years

⁵ See *Declarations and Statements* (29 October 2013) United Nations <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>.

later, on 26 June 1998, China enacted the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (China's EEZ Law). This law stipulates that China's EEZ extends 200 nautical miles from its baselines.⁶ Article 11 of China's EEZ Law states that:

All countries, provided observing the international law and laws and regulations of the People's Republic of China, enjoy the freedom of navigating in and flying over the exclusive economic zone of the People's Republic of China, enjoy the freedom of laying down submarine cables and piping in the exclusive economic zone and the continental shelf of the People's Republic of China, and enjoy other conveniences related to the freedom above-mentioned for legal use of ocean. The route of laying down submarine cables and piping must be subject to the consent of the competent authorities of the People's Republic of China.⁷

It can be understood from this article that foreign vessels and aircraft seeking to exercise the freedoms of navigation and overflight in China's EEZ must comply not only with international law rules but also China's relevant domestic legislation. Article 58(3) of the LOSC makes it clear that in exercising their rights and performing their duties in the EEZ, States "shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention."⁸ If China's domestic laws and regulations are not in keeping with the provisions of the LOSC, then China's requirement that other States comply with such laws and regulations is also inconsistent with this position. Moreover, article 14 of China's EEZ Law states that: "[T]he provisions of this Act shall not affect the historical rights of the People's

⁶ Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, adopted on 26 June 1998, art 2.

⁷ Ibid art 11.

⁸ LOSC, art 58(3).

Republic of China.”⁹ It is unclear precisely what China means by “historical rights”, as well as the geographic areas to which such rights may apply. According to Zou Keyuan, this provision indicates that China’s maritime claims in the South China Sea are based on the controversial “nine-dash line” – a claim which encompasses about 80 per cent of the ocean space in the South China Sea.¹⁰ However, Zou has also asserted that “[as] China has refused to recognise the Gulf of Tonkin as historic waters...how [can] the entire South China Sea become historic waters?”¹¹ According to Clive Symmons, a claim of “historic rights” must meet the general requirements of having formal claim, continuous and effective exercise of jurisdiction, as well as international acquiescence.¹² A leading Vietnamese author has argued that “[a] long time ago, regional countries pursued their normal activities in the East Sea (South China Sea) without encountering any Chinese impediment and they have never recognized historical rights of China there.”¹³ Indeed, Vietnam has officially lodged a protest against China’s EEZ Law, claiming that Vietnam:

[s]hall not recognize any so-called “historical interests” which are not consistent with international law and violate the sovereignty and sovereign rights of Viet Nam and Viet Nam’s legitimate interests in its maritime zones and continental shelf in the Eastern Sea as mentioned in article 14.¹⁴

⁹ Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, adopted on 26 June 1998.

¹⁰ See Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Martinus Nijhoff 2005) 95.

¹¹ Zou Keyuan, 'Historic Rights in International Law and in China's Practice' (2001) 32(2) *Ocean Development & International Law* 149, 162.

¹² Clive Ralph Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff Publishers, 2008) 240-245.

¹³ Hong Thao Nguyen, 'China's Maritime Moves Raise Neighbours' Hackles' (1998) 4(47) *Vietnam Law & Legal Forum* 1, 21.

¹⁴ See 'Vietnam: Dispute regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China which was passed on 26 June 1998' in *Law of the Sea Bulletin No. 38* (United Nations, 1998), 54.

The original nine-dash line consisted of eleven interrupted lines and was first published in 1947 by the Government of the Republic of China (presently Taiwan), and before the founding of the People's Republic of China (China).¹⁵ The map was then adopted by China with the deletion of two lines in the Gulf of Tonkin, thus becoming the nine-dash line map.¹⁶ However, China has not yet clarified what areas it claims within this nine-dash line. According to two commentators, given that the nine-dash map was poorly drawn “in the most inaccurate possible way” and without any geographical coordinates, it is “highly unlikely that any international court or tribunal charged with assessing the Chinese claim would attribute any substantial value to the map.”¹⁷ It is also worth noting that in 1993, Taiwan, the original author of the nine-dash map, claimed as historic waters areas within the nine-dash line.¹⁸ However, it can be seen from the 1998 Law on the Territorial Sea and the Contiguous Zone of the Republic of China that Taiwan has dropped its original position on historic waters.¹⁹ Moreover, on 12 July 2016, the arbitral tribunal ruled that “China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South

¹⁵ Robert Beckman, 'International law, UNCLOS and the South China Sea' in Robert C. Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing, 2013) 63.

¹⁶ Ibid.

¹⁷ Florian Dupuy and Pierre Marie Dupuy, 'A legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 134.

¹⁸ In 1993, Taiwan issued policy guidelines for the South China Sea which stated that: “The South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests.” See Kuan-Ming Sun, 'Policy of the Republic of China towards the South China Sea: Recent developments' (1995) 19(5) *Marine Policy* 401, 408.

¹⁹ See Zou Keyuan, *Law of the Sea in East Asia* (Routledge, 2005) 171; see also Law on the Territorial Sea and the Contiguous Zone of the Republic of China, promulgated on 21 January 1998 (entered into force 21 January 1998)

<<http://www.land.moi.gov.tw/law/enhtml/inquiriesdetail.asp?elid=76>>.

China Sea encompassed by the relevant part of the “nine-dash line” are contrary to the [LOSC] and without lawful effect.”²⁰

As the LOSC does not contain any provisions which directly address the issue of foreign military activities in the EEZ of coastal States, a number of States made declarations or statements upon signature and ratification of the Convention, restricting the freedoms of navigation and overflight of foreign military vessels and aircraft in their EEZs. Interestingly, China made no such statement.²¹ However, it can be deduced from a number of interpretative statements made by Chinese officials that the freedoms of navigation and overflight in the EEZ have certain restrictions, and should not include the freedom to conduct military activities in and over the EEZ.²² Some Chinese authors have also argued that the phrase “other internationally lawful uses of the sea” in the LOSC does not include the freedom to conduct military activities in the coastal State’s EEZ, and that foreign military activities in EEZ “encroach or infringe on the national security interests of the coastal State, and can be considered a use of force or threat to use force against that State.”²³ In a statement concerning joint naval exercises between the United States and South Korea in 2010, China’s Foreign Ministry spokesman Hong Lei proclaimed: “We hold a consistent and clear-cut stance on the issue. We oppose any party to take any military acts in our exclusive economic zone without permission.”²⁴

²⁰ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [278].

²¹ See Declarations and Statements, above n 5.

²² See Ren Xiaofeng and Cheng Xizhong, 'A Chinese Perspective' (2005) 29 *Marine Policy* 139, 142; Stuart Kaye, *Freedom of Navigation in Indo-Pacific Region*, Papers in Australian Maritime Affairs No 22 (Sea Power Centre, 2008), 20-1.

²³ Xiaofeng and Xizhong, above n 22, 142.

²⁴ Ian Johnson and Martin Fackler, *China Addresses Rising Korean Tensions* (November 26, 2010) *The New York Times*

<http://www.nytimes.com/2010/11/27/world/asia/27korea.html?pagewanted=all.&_r=0>.

One of the controversial issues regarding military activities in the EEZ is military surveys and hydrographic surveys. In relation to marine scientific research (MSR), Art 9 of China's EEZ Law states that:

Any international organization, foreign organization or individual engaging in marine scientific research in the exclusive economic zone and continental shelf of the People's Republic of China must have the approval of the competent authorities of the People's Republic of China and shall comply with the laws and regulations of the People's Republic of China.²⁵

This position is generally consistent with the LOSC.²⁶ However, the LOSC does not define the terms “marine scientific research” or “military surveys.” The silence of the LOSC on this issue has led to different interpretations being advanced by States. According to one Chinese author, “the so-called military survey activities are completely subsumed under the category of study called marine scientific research.”²⁷ Zhang Haiwen, the Deputy Director-General of China's Institute for Marine Affairs, has argued that any kind of marine data collecting activities in the EEZ “could be categorized as marine scientific research which is subject to the jurisdiction of the coastal State.”²⁸ Similarly, Zou Keyuan has expressed the view that “it is hard to understand the logic of the argument that while marine scientific research in the EEZ is subject to consent of the coastal State, military activities can be conducted freely

²⁵ Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, adopted on 26 June 1998, art 9.

²⁶ Article 246 of the LOSC states that: “Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State”.

²⁷ Yu Zhirong, 'Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) vol 7, 43.

²⁸ Zhang Haiwen, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? -Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) *Chinese Journal of International Law* 31, 36.

without any check by the coastal State.”²⁹ Professor Xue Guifang has even suggested that “hydrographic and military surveys in the EEZ should be under the jurisdiction of the coastal state.”³⁰ However, Ian Townsend–Gault and Clive Schofield have opined that “any activity such as hydrographic surveying, which is not expressly declared to be within the jurisdiction of the coastal State, remains one of the freedom [sic] of the seas.”³¹ For Pedrozo, hydrographic surveys and military surveys are different from marine scientific research.³² He explains that as military marine data collection is used for military, not scientific purposes, these activities are not subject to approval by the coastal State.³³ Indeed, Sam Bateman concurs with Pedrozo on this point, with the former asserting that “military activities are among the “other internationally lawful uses of the sea” related to the freedoms of navigation and overflight in an EEZ”. Nevertheless, Bateman has conceded that “there is very little difference between how MSR data and hydrographic data are used after the data are collected.”³⁴

In 1992, China enacted the Surveying and Mapping Law of the People’s Republic of China (1992 Surveying and Mapping Law) which stated that:

Surveying and mapping to be conducted in the territorial air, land and waters, as well as other sea areas under the jurisdiction of the People’s Republic of China by a foreign organization or individual alone or in cooperation with the relevant department or unit of the People’s Republic of China shall be subject to the approval by the Government of

²⁹ Keyuan, above n 19, 19.

³⁰ Xue Guifang, 'Surveys and Research Activities in the EEZ: Issues and Prospects ' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) 100.

³¹ Ian Townsend-Gault and Clive Schofield, 'Hardly Impeccable Behavior: Confrontations between Foreign Ships and Coastal States in the EEZ' (2009) 5(1) *International Zeitschrift* 1, 4.

³² See also Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 9, 22; Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (Paper presented at the Securing the Ocean for the Next Generation, Seoul, Korea, 21-24 May 2012), 28.

³³ Pedrozo, above n 32, 22.

³⁴ Sam Bateman, 'A Response to Pedrozo: The wider Utility of Hydrographic Survey' (2011) *Chinese Journal of International Law* 177, 179.

the People's Republic of China or by the department authorized by it. A foreign organization or individual that with due approval conducts surveying and mapping in the territorial air, land and waters, as well as other sea areas under the jurisdiction of the People's Republic of China either alone or in cooperation with the relevant department or unit of the People's Republic of China, must comply with relevant laws and administrative rules and regulations of the People's Republic of China...³⁵

The 1992 Surveying and Mapping Law, however, did not define the term "surveying and mapping." In 2002 China replaced this law with a new Survey and Mapping Law (the 2002 Survey and Mapping Law), which entered into force on 1 December 2002. This new law defines survey and mapping activities as: "the activities conducted to determine, collect and formulate the key elements of physical geography or the shapes, sizes, space positions, attributes, etc. of man-made surface installations, as well as to process and provide the data, information and results gained therefrom."³⁶ According to this law, foreign organisations or individuals can only conduct surveying and mapping within areas under Chinese jurisdiction with the approval of the People's Republic of China.³⁷ Article 7 of this law also states that:

Foreign organizations or individuals that wish to conduct surveying and mapping in the territorial air, land or waters of the People's Republic of China shall, as required by law, join hands with the relevant departments or units of the People's Republic of China in the form of Chinese-foreign equity joint venture or Chinese-foreign contractual joint

³⁵ See *Surveying and Mapping Law of the People's Republic of China* The Supreme People's Court of the People's Republic of China <<http://en.chinacourt.org/public/detail.php?id=3325>>.

³⁶ *The Surveying and Mapping Law of the People's Republic of China (Order of the President No.75), adopted on 29 August 2002 (entered into force 1 December 2002)* <http://www.mlr.gov.cn/mlrenglish/laws/200710/t20071012_656326.htm>, art 2.

³⁷ Ibid art 7.

venture and such surveying and mapping may not involve State secrets or endanger State security.³⁸

It can be seen from the 2002 Survey and Mapping Law that, due to security concerns, surveying and mapping activities conducted by foreign organizations or individuals within areas under Chinese jurisdiction must now take the form of cooperative partnerships with Chinese governmental agencies or private sector actors. According to Pedrozo, the effect of the above law is that China is seeking to regulate all activities in its EEZ – including hydrographic surveys, military oceanographic surveys and surveillance activities. Such action, however, is inconsistent with customary international law and the LOSC.³⁹

In practice, there have been a number of incidents involving the passage of sovereign immune vessels and aircraft in China's EEZ. In 2001, the USNS *Bowditch* was conducting hydrographic surveys in the Yellow Sea (and within China's claimed EEZ) when it was confronted by a Chinese warship and ordered to leave the area.⁴⁰ On 1 April 2001, a Chinese naval F-8II fighter jet collided with a U.S. Navy EP-3 reconnaissance plane in the airspace above China's claimed EEZ, approximately 70 nautical miles south-east of Hainan Island.⁴¹ This collision resulted in the death of a Chinese pilot and forced an emergency landing of the EP-3 on Hainan.⁴² China argued that the surveillance activity in China's EEZ violated the principle of "overflight freedom" as stipulated in the LOSC and amounted to an abuse of right, damaging

³⁸ Ibid.

³⁹ Pedrozo, above n 32, 21.

⁴⁰ See Raul Pedrozo, 'Close Encounters at Sea: The USNS Impeccable Incident' (2009) 62(3) *Naval War College Review*, 101; see also Zou Keyuan, 'Navigational rights and marine scientific research: a further clarification?' in Wu Shicun and Zou Keyuan (eds), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions* (Chandos Publishing, 2013) 84.

⁴¹ Shirley A Kan, 'China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications' (Congressional Research Service, October 2001), 1.

⁴² Ibid; see also Eric Donnelly, 'The United States-China EP-3 Incident: Legality and Realpolitik' (2004) 9(1) *Journal of Conflict & Security Law* 25, 25-6.

China's security interests.⁴³ However, according to the United States, the EP-3 was enjoying the freedom of overflight in international airspace, which includes airspace over the EEZ.⁴⁴ Eight years later, on 9 March 2009, another incident occurred within China's EEZ. This one involved a U.S. Navy ocean surveillance vessel, the USNS *Impeccable*, and a number of Chinese civilian and law enforcement ships approximately 75 nautical miles south of Hainan Island.⁴⁵ The United States lodged a formal protest in relation to the standoff, asserting that China's actions were "illegal, unprofessional and dangerous."⁴⁶ In response, China claimed that the USNS *Impeccable* had violated international law and threatened China's national security. China also "demand[ed] that the United States put an immediate stop to related activities and take effective measures to prevent similar acts from happening."⁴⁷ On 19 August 2014, a Chinese fighter jet intercepted a U.S. Navy P-8 Poseidon aircraft in international airspace, approximately 135 miles east of Hainan Island and in a manner which U.S. Department of Defence spokesperson Admiral John Kirby described as "unprofessional...unsafe...and...certainly not in keeping with the kind of military-to-military relations that we'd like to have with China."⁴⁸ In response, Chinese Defense Ministry spokesman Yang Yujun stated that: "[I]f the United States really hopes to avoid impacting bilateral relations, the best course of action is to reduce or halt close surveillance of China."⁴⁹

⁴³ See Joseph Y. S. Cheng and King-Lun Ngok, 'The 2001 "Spy" Plane Incident Revisited: the Chinese Perspective' (2004) 9(1) *Journal of Chinese Political Science* 64, 67; see also Donnelly, above n 42, 30.

⁴⁴ Cheng and Ngok, above n 42, 71; see Kan, above n 41, 20; see also Margaret K. Lewis, 'An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident' (2002) 77 *New York University Law Review* 1404, 1420.

⁴⁵ See Townsend-Gault and Schofield, above n 31. This incident will be discussed in depth in chapter 5.

⁴⁶ See Thom Shanker, *China Harassed U.S. Ship, the Pentagon Says* (March 2009) *The New York Times* <<http://www.nytimes.com/2009/03/10/washington/10military.html>>.

⁴⁷ Yuli Yang, *China says U.S. ship violated international law* (10 March 2009) CNN.com <http://edition.cnn.com/2009/WORLD/asiapcf/03/10/us.navy.china/index.html?eref=ib_us>.

⁴⁸ Zachary Keck, *China's 'Dangerous Intercept' of US Spy Plane* (23 August 2014) *The Diplomat* <<http://thediplomat.com/2014/08/chinas-dangerous-intercept-of-us-spy-plane/>>.

⁴⁹ 'Reduce or stop it': China vows to respond to US 'close surveillance' patrols (28 August 2014) *Russia Today* <<http://www.rt.com/news/183408-china-us-military-dispute/>>.

It is interesting to note that Chinese military vessels have conducted a number of military activities within the EEZs of other States without providing advance notification. According to the U.S. Department of Defence, there have been several instances of Chinese naval activities in the EEZs around Guam and Hawaii.⁵⁰ At the Maritime Security Session of the Shangri-La Dialogue in Singapore on 1 June 2013, Senior Colonel Zhou Bo of the Foreign Affairs Office of China's Ministry of National Defence stated that China had "sort of reciprocated America's reconnaissance in our EEZ by sending our ships to America's EEZ for reconnaissance a few times."⁵¹ In May 2014, China installed an oil rig in the EEZ and on the Continental Shelf claimed by Vietnam, and also sent its military and maritime law enforcement forces to protect the operation of the rig.⁵² This action created a high degree of tension and led to several crashes between sovereign immune vessels of the two countries. In July 2014, a Chinese Dongdiao-class auxiliary general intelligence ship was detected while collecting military intelligence in the EEZ of the United States, off the coast of Hawaii, during the Rim of the Pacific Exercise.⁵³ Commenting on this situation, Admiral Sam Locklear, Commander of the U.S. Pacific Command, stated that "this is within the law and it's their right to do it."⁵⁴ In response, China's Defense Ministry stated that: "[T]he People's Liberation Army naval ships' operation in waters outside the territorial seas of other

⁵⁰ See U.S. Department of Defense, 'Annual Report to Congress on China's Military Power, Military and Security Developments Involving the People's Republic of China 2013 ' (2013), 39.

⁵¹ See Kimberly Hsu and Craig Murray, 'China's Expanding Military Operations in Foreign Exclusive Economic Zones' (U.S.-China Economic and Security Review Commission, 2013); see also Rory Medcalf, *Is China 'reciprocating' US maritime surveillance?* (1 June 2013) The Interpreter <<http://www.lowyinterpreter.org/post/2013/06/01/Is-China-reciprocating-US-maritime-surveillance.aspx>>.

⁵² See chapter 7 of this thesis for further discussion on this point.

⁵³ Zachary Keck, *China Is Spying on RIMPAC* (20 July 2014) The Diplomat <<http://thediplomat.com/2014/07/china-is-spying-on-rimpac/>>.

⁵⁴ Jon Harper, *PACOM chief: China spying on RIMPAC brings 'good news'* (29 July 2014) Stars and Strips <<http://www.stripes.com/news/pacific/pacom-chief-china-spying-on-rimpac-brings-good-news-1.295829>>.

countries is in line with international law and international practice.”⁵⁵ Therefore, the United States accepts foreign military activities in its EEZ. Meanwhile, China, though prohibiting foreign military activities in its own EEZ, considers it has the right to conduct military activities in EEZs of *other* States.

In summary, as a party to the LOSC, China has enacted a number of domestic laws and regulations to implement the LOSC regarding the EEZ. The inclusion of so-called “historic waters” in China’s EEZ Law has created controversies and led to protests by other States. Moreover, it is inconsistent with the LOSC for China to impose conditions on foreign vessels and aircraft exercising the freedoms of navigation and overflight or to restrict foreign military activities in China’s EEZ. Indeed, that China conducts military activities in the EEZs of other States while restricting such activities in its own EEZ reveals a startling inconsistency in its policy. As Raul Pedrozo has correctly highlighted: “It therefore appears that China is applying a double standard.”⁵⁶

6.2.2 Taiwan

Taiwan declared an EEZ of 200 nautical miles in 1979 by Presidential Decree No. 5046.⁵⁷ In 1998 it promulgated the Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China (Taiwan’s EEZ Law).⁵⁸ This law reaffirms Taiwan’s EEZ as being 200 nautical miles measured from the baselines of the territorial

⁵⁵ Zachary Keck, *US Welcomes China’s RIMPAC Spying* (30 July 2014) *The Diplomat* <<http://thediplomat.com/2014/07/us-welcomes-chinas-rimpac-spying/>>.

⁵⁶ Raul Pedrozo, ‘Military Activities in the Exclusive Economic Zone: East Asia Focus’ (2014) 90 *International Law studies* 514, 542.

⁵⁷ See Yann-huei Song, ‘The PRC’s Peacetime Military Activities in Taiwan’s EEZ: A Question of Legality’ (2001) 16(4) *International Journal of Maritime and Coastal Law* 625, 625.

⁵⁸ See *Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China* <<http://www.land.moi.gov.tw/law/enhtml/indexdetail.asp?elid=77>>.

sea.⁵⁹ It is interesting to note that only article 11 of Taiwan’s EEZ Law mentions the navigation regime, stating that:

For any vessel navigating in the exclusive economic zone of the Republic of China which commits a discharge violation causing marine environmental pollution, the Republic of China may request that vessel to give information regarding its identity, its port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.⁶⁰

As sovereign immune vessels and aircraft are not subject to the provisions of the LOSC regarding the protection and preservation of the marine environment, they are not required to observe coastal State law on the prevention of marine pollution. It is worth noting that article 11 of Taiwan’s EEZ Law is silent on the overflight of foreign aircraft and foreign military activities in the State’s EEZ. Regarding its claim to “historic waters”, Taiwan’s 1993 Policy Guidelines for the South China Sea maintained that “[t]he South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China processes all rights and interests.”⁶¹ In 1995, Taiwan’s Minister of Foreign Affairs reaffirmed this position, proclaiming that “our government has sovereignty over the historic U-shaped territory.”⁶² However, unlike China’s EEZ Law, Taiwan’s EEZ Law does not contain any provision regarding historic waters, and there have been no official statements made by Taiwan on its “historic waters” claim since the passage of this particular law.⁶³

⁵⁹ Ibid art 2.

⁶⁰ Ibid art 11.

⁶¹ See Policy Guidelines for the South China Sea in Sun, above n 18.

⁶² See OW0604093695 Taipei LIEN-HO PAO (in Chinese), Apr. 5, 1995, cited in Jon M Van Dyke, 'Disputes Over Islands and Maritime Boundaries in East Asia' in Seoung Yong Hong and Jon M. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff, 2009) 65.

⁶³ See Yann Huei Song and Zou Keyuan, 'Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States' (2000) 31(4) *Ocean Development & International Law* 303, 329.

Generally, Taiwan's EEZ Law is consistent with the LOSC.⁶⁴ However, in relation to marine scientific research, article 9(5) of this law states that the undertaking of maritime scientific research in the EEZ or on the continental shelf of Taiwan shall "not prejudice the security and benefits of the Republic of China in using such research data." This provision is inconsistent with the LOSC as Part XIII of the Convention does not contain any provision which imposes security conditions on marine scientific research.⁶⁵

As China claims Taiwan as its province, theoretically China also claims the EEZ claimed by Taiwan. However, in reality, Taiwan's EEZ law applies to waters under Taiwan's jurisdiction. Between 1995 and 1996 China conducted a number of missile tests and military exercises near Taiwan's coastline and within the EEZ claimed by Taiwan.⁶⁶ According to Yann-huei Song, Taiwan is a "*de facto* State, satisfying all the generally accepted criteria for statehood" as well having full diplomatic relations with 28 States.⁶⁷ Given that China does not recognise foreign military activities in its EEZ, the question which arises is whether it is justifiable for China to conduct military activities in Taiwan's EEZ.

In summary, even though Taiwan is not a party of the LOSC, it has enacted laws and regulations to implement the EEZ regime, notably Taiwan's EEZ Law. However, this law is silent on the freedoms of navigation and overflight in the State's EEZ. As China claims Taiwan as a province, and all coastal States in the South China Sea recognise "one China" policy, the practical implementation of Taiwan's EEZ law is fraught with difficulty.

⁶⁴ See also Kaye, above n 28, 35.

⁶⁵ See LOSC, Part XIII; 'Taiwan's Maritime Claims' in *Limits in the Seas* (United States Department of State, 2005) vol 127, 17.

⁶⁶ Song, above n 57, 630-2.

⁶⁷ Ibid 626.

6.2.3 Vietnam

Vietnam officially declared its EEZ in 1977 with its Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf.⁶⁸ In this Statement, Vietnam declared an EEZ to extend 200 nautical miles from the baseline used to measure the breadth of its territorial sea.⁶⁹ However, this statement did not contain any provisions regarding the navigation and overflight of foreign vessels and aircraft. Rather, Vietnam's first official statement relating to the issue of navigation in its EEZ was Decree No. 30-CP, 1980 on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones (Decree No.30-CP). According this Decree, foreign ships operating in the contiguous zone, the territorial sea or the internal waters of Vietnam are not permitted to "conduct military exercises, use force or the threat of force to threaten the security, or disturb the good order of the Socialist Republic of Vietnam."⁷⁰ Unfortunately the Decree only mentions the operation of foreign ships and aircraft outside the contiguous zone, but not within Vietnam's EEZ. As discussed above, the treatment of the contiguous zone as a security zone in the Decree is inconsistent with the LOSC. Article 2 of Decree No.30-CP states that all foreign ships operating in Vietnamese maritime zones "must respect the sovereignty of the Socialist Republic of Vietnam over each maritime zone."⁷¹ This means that, at that time, Vietnam used the term 'sovereignty' in respect of all its maritime zones, without distinguishing between sovereignty and sovereign rights. Article 13 of the decree also made it clear that foreign ships operating in Vietnamese maritime zones must not "conduct acts prejudicial to the

⁶⁸ See Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977 published in Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (Martunus Nijhoff Publishers, 1998), appendix 3.

⁶⁹ Ibid.

⁷⁰ Vietnam's Decree No. 30-CP on Regulations for Foreign Ships Operating in Vietnamese Maritime Zones (29 January 1980), art 13.

⁷¹ Ibid art 2.

defence of the peace, security or good order of the SRVN, or carry out propaganda against the SRVN.”⁷² With the entering into force of the Law of the Sea of Vietnam in 2013, Vietnam’s position on the contiguous zone has changed to be consistent with the provisions of the LOSC.⁷³ Regarding the navigation regime in the EEZ, the Law of the Sea of Vietnam states that:

The State of Vietnam respects freedom of navigation and overflight, the right to lay submarine cables and pipelines and lawful uses of the sea by other States in Vietnam’s exclusive economic zone in accordance with this Law and treaties to which the Socialist Republic of Vietnam is a contracting party, provided that those operations are not detrimental to the sovereign rights, jurisdiction and national maritime interests of Vietnam.⁷⁴

As the LOSC grants the coastal States with specific rights and jurisdiction within their EEZs, the addition of “national maritime interests” in this article is considered inconsistent with the LOSC EEZ provisions. There is no article specifically addressing military activities in Vietnam’s EEZ. Therefore, it would appear that as long as these activities are considered to be “lawful uses of the sea”, they are permitted. In practice, there have been no incidents regarding foreign military activities in Vietnam’s EEZ. However, during the maritime standoff between China and Vietnam in 2014 in relation to the drilling of a Chinese oil rig in Vietnam’s claimed EEZ, many confrontations occurred between sovereign immune vessels and aircraft of the two States.⁷⁵

⁷² Ibid art 13.

⁷³ See The Law of the Sea of Vietnam, signed on 21 June 2012 (entered into force 1 January 2013), art 13 & 14.

⁷⁴ Ibid art 16(2).

⁷⁵ These incidents will be discussed further in chapter 7.

6.2.4 Indonesia

On 21 March 1980, Indonesia issued the Declaration by the Government of Indonesia concerning the Exclusive Economic Zone of Indonesia (1980 Declaration), which stated that the breadth of Indonesia's EEZ extends 200 nautical miles from the baselines from which its territorial sea is measured.⁷⁶ Article 4 of this Declaration provides that:

In the Exclusive Economic Zone of Indonesia, the freedoms of navigation and overflight and of the laying of sub-marine cables and pipelines will continue to be recognized in accordance with the principles of the new international law of the sea.⁷⁷

After the LOSC was opened for signature in December 1982, Indonesia passed Act No. 5 of 1983 on the Indonesian exclusive economic zone of 18 October 1983 (Act No. 5) in order "to provide a solid basis for the exercise of the sovereign right, other rights, jurisdiction and duties within the exclusive economic zone."⁷⁸ This Act reaffirmed that the breadth of the State's EEZ is 200 nautical miles measured from its baselines.⁷⁹ Regarding the navigation regime, article 4(3) states that:

Within the Indonesian exclusive economic zone, the freedom of international navigation and overflight, as well as the freedom of laying submarine cables and pipelines, shall be respected in accordance with the principles of the international law of the sea.⁸⁰

This article repeats verbatim article 4 of the 1980 Declaration. Not a single provision of the act mentions the passage of warships or aircraft in Indonesia's EEZ. However, in 2007, at a meeting of the ASEAN Regional Forum (ARF) in Manila,

⁷⁶ See *Declaration by the Government of Indonesia concerning the Exclusive Economic Zone of Indonesia 21 March 1980* <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1980_DeclarationEEZ.pdf>.

⁷⁷ Ibid art 4.

⁷⁸ See *Act No. 5 of 1983 on the Indonesian exclusive economic zone, 18 October 1983* <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1983_Act.pdf>.

⁷⁹ Ibid art 2.

⁸⁰ Ibid art 4(3).

Indonesia, together with Malaysia, objected to an ARF-proposed military exercise in the EEZs of the two States.⁸¹

In relation to foreign marine scientific research in the EEZ, Indonesia requests prior consent and imposes conditions.⁸² Act No. 5 also embraces a very broad definition of “scientific research.” Article 1(c) defines “scientific research” as “any activity in connection with the research on any maritime aspects on the water surface, in the water column, on the seabed and in the subsoil thereof the sea floor in the Indonesia exclusive economic zone.”⁸³

It is unclear whether Indonesia intends on including military activities (such as hydrographic surveys and military surveys) within the scope of “scientific research.” However, in practice, there have been no incidents involving the passage of military vessels and aircraft in Indonesia’s exclusive economic zone.

6.2.5 The Philippines

The Philippines established an exclusive economic zone by virtue of Presidential Decree No. 1599 of 11 June 1978 (Decree No. 1599), declaring that the State’s EEZ “shall extend to a distance of two hundred nautical miles beyond and from the baseline from which the territorial sea is measured.”⁸⁴ Section 4 of the Decree states that:

⁸¹ See Raul Pedrozo, 'Military Activities In and Over the Exclusive Economic Zone' in Myron H. Nordquist, Tommy T. B. Koh and John Norton More (eds), *Freedom of the Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff, 2009) , 235-7.

⁸² above n 78, art 7.

⁸³ Ibid art 1(c).

⁸⁴ See *Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone and for other purposes*

<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf>.

Other States shall enjoy in the exclusive economic zone freedoms with respect to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea relating to navigation and communications.⁸⁵

It is clear that the Philippines respects the freedoms of navigation and overflight and “other internationally lawful uses of the sea” granted by the LOSC. However, as mentioned previously, a vast portion of the Philippine EEZ overlaps with the rectangular area established by the Treaty of Paris (and in respect of which the Philippines has claimed “historic territorial waters”).⁸⁶ Indeed, in some areas, the historic territorial sea of the Philippines extends further than its EEZ.⁸⁷ Section 2 of the Decree affirms that the rights exercisable by the State in its EEZ shall not “prejudice...the rights of the Republic of the Philippines over its territorial sea”.⁸⁸ In 2009 the Philippines passed a new baselines law in an attempt to bring its maritime claims into close conformity with the provisions of the LOSC. However, it has neither amended its Constitution nor formally abandoned its historic maritime claim.⁸⁹ As a result, the freedoms of navigation and overflight and “other internationally lawful uses of the sea” may only apply to a small portion of the EEZ outside the limits established by the Treaty of Paris.⁹⁰

Regarding research activities, section 3 of Decree No. 1599 states that “any research” conducted in the Philippine EEZ shall be approved under authority by the

⁸⁵ Ibid section 4.

⁸⁶ See also Lowell Bautista, 'Philippine boundaries: internal tensions, colonial baggage, ambivalent conformity' (2011) 16(December) *Journal of Southeast Asian Studies* 35, 42.

⁸⁷ See Figure 4.1: Boundary of the Philippine Treaty Limits in Chapter 4 of this thesis.

⁸⁸ See above n 84, section 2.

⁸⁹ See Robert C. Beckman and Clive H. Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) *The International Journal of Marine and Coastal Law* 193, 197.

⁹⁰ As the rectangular area defined by the Treaty of Paris extends 600 miles in width and 1200 miles in length, the area of the Philippines' EEZ outside this rectangular area is very small; see also Merlin M. Magallona, 'A Framework for the Study of National Territory: A Statement of the Problem' (2008) 33(2) *IBP Journal* 1, 12; Lowell Bautista, 'The Philippine Treaty Limits and Territorial Water Claim in International Law' (2009) 5(1/2) *Social Science Diliman* 107, 109.

Republic of the Philippines.⁹¹ However, there is no definition for the term “research” in this Decree. Therefore, it is not clear whether military activities such as hydrographic surveys and military surveys fall within the ambit of the term “research.” Upon signature and ratification to the LOSC, the Philippines made no statement regarding military activities in its EEZ. And although there are no provisions in the national legislation of the Philippines restricting foreign military activities in its EEZ, there have been a number of occasions where the Philippines has opposed foreign military activities in its EEZ.⁹² However, in practice, there have been no incidents directly involving the Philippines regarding the passage of sovereign immune vessels and aircraft in the Philippine EEZ.

6.2.6 Malaysia

In 1984 Malaysia passed the Exclusive Economic Zone Act (Act No. 311), declaring an EEZ extending 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁹³ Act No. 311 does not mention the freedoms of navigation and overflight in Malaysia’s EEZ. Regarding research activities in its EEZ, Malaysia requires its consent for the carrying out of any search, excavation, drilling operations or marine scientific research.⁹⁴ There is no provision in Act No. 311 dealing with foreign military activities. However, upon ratification of the LOSC on 14 October 1996, Malaysia made a declaration stating that:

The Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular

⁹¹ See above n 84, section 3.

⁹² Pedrozo, above n 56, 521.

⁹³ See *Exclusive Economic Zone Act, 1984, Act No. 311*

<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf>.

⁹⁴ Ibid section 5.

those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State.⁹⁵

With this statement, Malaysia made it clear that it does not permit foreign military activities in its EEZ. As discussed above, the LOSC allows States to make declarations or statements upon signature, ratification or accession to the Convention, provided such declarations or statements “do not purport to exclude or to modify the legal effect of the provisions of [the] Convention.”⁹⁶ Similarly, article 309 of the LOSC prevents States from making any reservations or exceptions to the Convention “unless expressly permitted by other articles of [the] Convention.”⁹⁷ According to Hamzah, “Malaysia views foreign military activities in its EEZ as not only undermining and threatening its security; it goes against the concept of peaceful uses of the sea, which it unconditionally supports.”⁹⁸ Although the LOSC uses the terms “peaceful uses” and “peaceful purposes”, the Convention eschews any definition of these terms. Many commentators agree that the concept of peaceful uses/purposes used in the LOSC do not prohibit *all* military activities, only those which are inconsistent with the UN Charter.⁹⁹ It is also worth noting that, in relation to the peaceful use of the seas, a 1985 report of the United Nations Secretary-General on the naval arms race stated that:

⁹⁵ See Declaration upon ratification of Malaysia (14 October 1996) *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter* <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

⁹⁶ LOSC, art 310.

⁹⁷ LOSC, art 309.

⁹⁸ BA Hamzah, 'Foreign military activities in the EEZ: preliminary views from Malaysia' in Shicun Wu and Keyuan Zou (eds), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions* (Chandos Publishing, 2013) , 165.

⁹⁹ Francesco Francioni, 'Peacetime use of Force, Military Activities, and the New Law of the Sea' (1985) 18(2) *Cornell International Law Journal* 203, 223; Boleslaw Adam Boczek, 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries' (1988) 19 *Ocean Development & International Law* 445, 457; Pedrozo, above n 56, 533; Moritaka Hayashi, 'Military and intelligence gathering activities in the EEZ: definition of key terms' (2005) 29 *Marine Policy* 123, 125.

[M]ilitary activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea.¹⁰⁰

Among the littoral States of the South China Sea, only Malaysia has made a statement regarding military activities in the EEZ. However, Malaysia has not enacted any domestic legislation to enforce this statement.¹⁰¹ In 2013, when China sent a flotilla to patrol the area near James Shoal, a reef claimed by Malaysia and located well inside its mainland claimed EEZ, Malaysia responded only diplomatically, with restraint, to this incident.¹⁰²

6.2.7 Brunei

With the passage of the Brunei Darussalam Fishery Limits Act in 1983, Brunei claimed a fishery limit to 200 miles from the baselines from which the breadth of the territorial sea is measured.¹⁰³ As Brunei has not yet established its EEZ, there are no laws or regulations in place concerning the passage of sovereign immune vessels and aircraft in the EEZ.

6.3 The uncertain EEZ boundary

As discussed above, all littoral States of the South China Sea have claimed an EEZ extending to 200 nautical miles from the baselines (Brunei has claimed fishery limits rather than an EEZ). However, the outer limits of the EEZs in this maritime region remain unclear.¹⁰⁴ According to Clive Schofield and Robert Beckman, “none of the States bordering the South China Sea have issued official charts or lists of

¹⁰⁰ *Naval Armed Race*, Report of the Secretary-General, UN doc. A/40/535, para.188.

¹⁰¹ Hamzah, above n 98, 168.

¹⁰² See Trefor Moss and Rob Taylor, *Chinese Naval Patrol Prompts Conflicting Regional Response* The Wall Street Journal

<<http://online.wsj.com/news/articles/SB10001424052702304914204579392720879214320>>

¹⁰³ See Brunei Darussalam Fishery Limits Act, commenced on 1st January 1983, art 3(1).

¹⁰⁴ Beckman, above n 15.

geographic coordinates showing the outer limit lines of their EEZ.”¹⁰⁵ Indeed, there are a number of factors which make the delimitation of EEZ boundaries in the South China Sea a difficult task.

Firstly, the straight baselines declared by a number of coastal States have been criticised and protested against by other States, while some coastal States have not defined the baselines from which their other maritime zones are measured. The straight baselines declared by Vietnam, China and Taiwan have been protested against by the United States.¹⁰⁶ In particular, the straight baselines defined by China around the Paracel Islands were objected to by Vietnam, the United States and Taiwan.¹⁰⁷ The archipelagic baselines defined by Indonesia and the Philippines (pursuant to their 2009 baselines law) are considered to be generally consistent with the LOSC,¹⁰⁸ while Malaysia and Brunei have not officially published their baselines. However, it can be seen from the map contained in the Joint Submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf (CLCS) in 2009 that straight baselines have been used by Malaysia.¹⁰⁹ (See on the Malaysia-Vietnam CLCS submission, figure 6.1.)

¹⁰⁵ Beckman and Schofield, above n 89, 200.

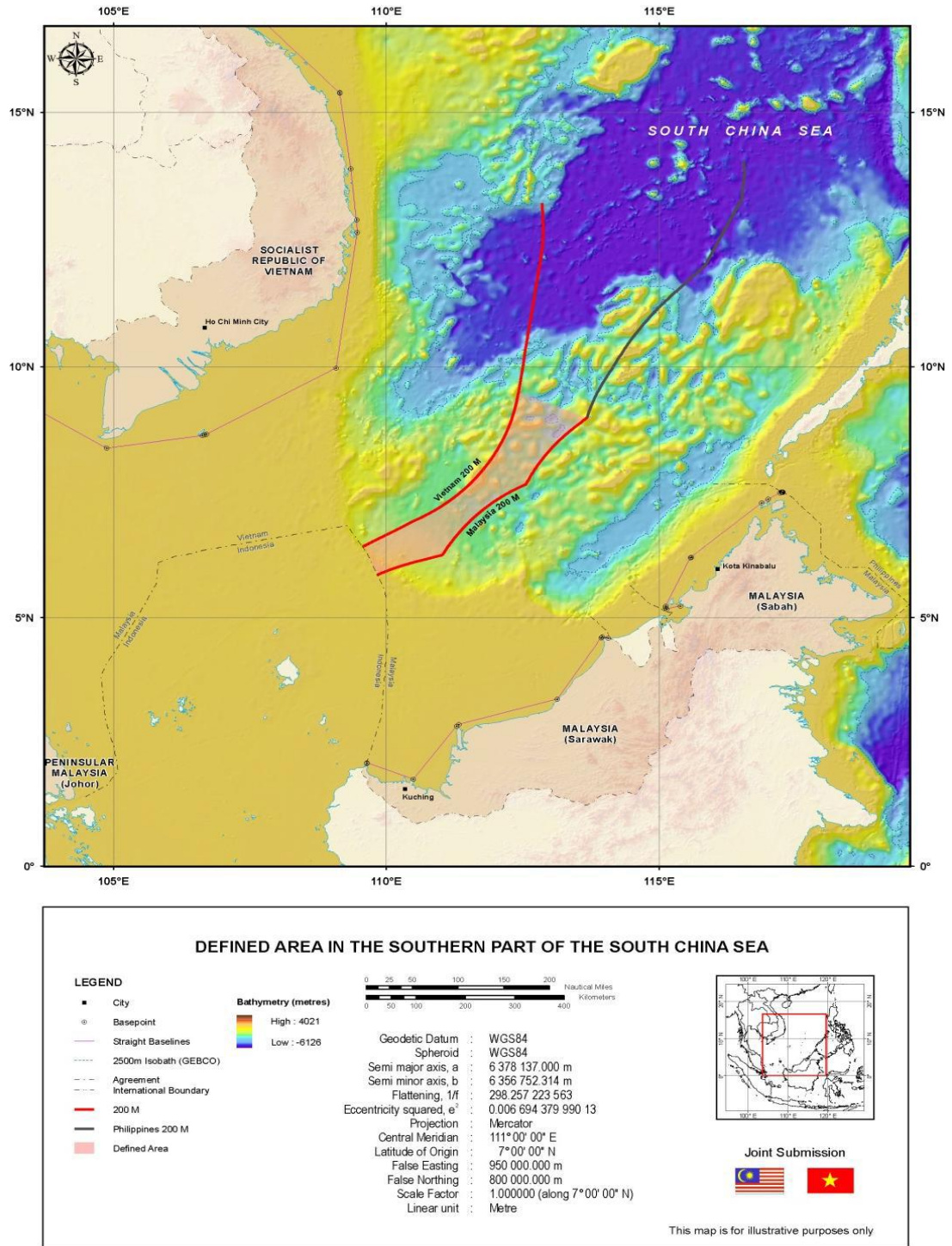
¹⁰⁶ See Clive Schofield, 'What's at stake in the South China Sea? Geographical and geopolitical considerations' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) , 15; see also Ashley J. Roach and Robert W. Smith, *Excessive Maritime Claims* (Martinus Nijhoff 2012), 99.

¹⁰⁷ Vietnam and Taiwan have opposed China's defined straight baselines around the Paracel Islands. Indeed, both States are involved in sovereignty disputes with China over these Islands. The United States has also criticised China's baselines, asserting that straight baselines connecting the outermost points of outermost islands only apply to archipelagic States, not to a group of islands belonging to a coastal State, as is China's claim over the Paracels; see also Beckman, above n 15.

¹⁰⁸ Ibid, 59; see also Beckman and Schofield, above n 89, 198.

¹⁰⁹ *Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea* (6 May 2009) United Nations
<http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf>.

Figure 6.1 Vietnam-Malaysia Joint Submission on the Limits of the Continental Shelf- 2009



Source: Commission on the Limits of the Continental Shelf

Secondly, mid-ocean island maritime zones in the South China Sea remain unresolved. China has employed straight baselines around the Paracel archipelago, but

no maritime zones have been generated from these baselines. Meanwhile, “Vietnam has not indicated whether it is claiming an EEZ or continental shelf from the Paracel Islands.”¹¹⁰ China, Taiwan and the Philippines have all claimed sovereignty over Scarborough Shoal, but none of them have established baselines around this Shoal.¹¹¹ In the north-eastern part of the South China Sea, China and Taiwan have both claimed sovereignty over the Pratas Islands, despite Taiwan exercising full control over this feature. Taiwan claims an EEZ around its main island and also an EEZ around the group, with the latter extending 200 nautical miles from the baselines.¹¹² The EEZ claimed by Taiwan overlaps with the EEZ claimed by the Philippines in the area of the Luzon Strait.¹¹³ However, as the Philippines officially recognises a “one China” policy, it is highly unlikely that an EEZ boundary delimitation will be reached between Taiwan and the Philippines in this maritime area.¹¹⁴ Unlike the Paracels, no baselines have been defined around the Spratlys. Littoral States have different views on whether some features of the Spratlys can be classified as islands which can generate their own EEZs in accordance with article 121 of the LOSC.¹¹⁵ In 2009, Vietnam and Malaysia made a joint submission to the United Nations Commission on the Limits of the Continental Shelf, but neither State claimed an EEZ from any of the Spratly Islands.¹¹⁶ However, in a *Note Verbale* submitted to the UN Secretary-General on 14 April 2011, China stated that the Spratly Islands “are fully entitled to a territorial sea, exclusive economic zone

¹¹⁰ Beckman and Schofield, above n 89, 203.

¹¹¹ Ibid 231.

¹¹² Ibid 225.

¹¹³ Ibid 226.

¹¹⁴ Ibid 227.

¹¹⁵ See LOSC, art 121.

¹¹⁶ See Beckman, above n 15, 67.

and continental shelf.”¹¹⁷ According to Clive Schofield, if the 200 nautical mile limit of the EEZ is constructed from straight baselines and archipelagic baselines of littoral States, then there exists a small high seas pocket in the centre part of the South China Sea. However, if the disputed islands of the South China Sea can generate their own EEZs, then no high seas pocket will exist in this maritime region.¹¹⁸ It is worth noting that the arbitral tribunal, in its final award in the South China Sea Arbitration, held that all the high-tide features in the Spratly Islands “do not generate entitlements to an exclusive economic zone or continental shelf.”¹¹⁹

Thirdly, the so-called “nine-dash line” map claimed by China has created ambiguity and confusion when identifying maritime boundaries in the South China Sea. As discussed above, China has not officially declared what it claims within the nine-dash line (which encompasses about 80 percent of the ocean space in the South China Sea). According to Beckman, “it is not possible to identify the overlapping claim areas in the South China Sea” until China clarifies its claim.¹²⁰ If China claims sovereignty over all offshore features within the nine-dash line, as well as the associated maritime zones which can be generated from these features under the LOSC, then, putting to one side disputed sovereignty claims with other littoral States over these offshore features, its claim would appear to be consistent with international law. However, if China claims sovereignty or sovereign rights over all waters and offshore features within the nine-dash line, then a feasible solution to maritime boundary delimitation in the South China

¹¹⁷ See *Note from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, CML/8/2011*

<http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>.

¹¹⁸ Schofield, above n 106, 25.

¹¹⁹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [646].

¹²⁰ Beckman, above n 15, 78.

Sea would be almost impossible.¹²¹ Fortunately, as discussed above, the arbitral tribunal has already ruled that the nine-dash line claimed by China has no legal basis. As the arbitral tribunal's award is legally binding (despite China's rejection of it), the nine-dash line claimed by China should be ignored in any future negotiation regarding maritime delimitation in the South China Sea where China is a party. However, ignoring the nine-dash line, many offshore features of the South China Sea have been claimed and occupied by other States. As sovereignty disputes over these features are unlikely to be resolved, maritime delimitation involving these features is unlikely to be achieved anytime soon.

In summary, the remaining disputes over sovereignty claims to offshore islands between coastal States together with the different perspectives between China and other littoral States over maritime zones that may be generated from these offshore islands will remain and are unlikely to be resolved. If China respects international law and the arbitral tribunal's rulings, then the disputed maritime areas in the South China Sea will be narrowed down. However, it has appeared that this might not be the case. The uncertain nature of the remaining EEZ boundary, together with the variations which exist in the implementation of the LOSC's EEZ regime by coastal States, renders jurisdictional rights over this maritime zone even more ambiguous.

6.4 Future prospects

It is clear that maritime boundaries in the South China Sea remain uncertain and difficult to resolve. While other littoral States have sought to bring their maritime claims into conformity with the LOSC, China continues to claim its maritime zones

¹²¹ For a more detailed discussion, see United States Department of State *Limits in the Seas: China Maritime Claims in the South China Sea* (December 5, 2014).

based not just upon the LOSC but also upon historical grounds.¹²² Some authors have argued that as each of the coastal States in the region claim areas that are immediately contiguous to their territorial seas, their conflicting claims could be harmonized. However, as “China claims the entirety of the South China Sea...there is no possibility of compromise with [its] position, since it is all or nothing.”¹²³ The LOSC makes it clear that all disputes concerning the interpretation or application of the provisions of the LOSC shall be submitted to the court or tribunal having jurisdiction under Section 2, Part XV of the Convention.¹²⁴ According to article 287 of the LOSC, when signing, ratifying or acceding to this Convention, States are free to choose one or more of four methods for the settlement of disputes concerning the interpretation or application of the Convention, including adjudication before the International Court of Justice (ICJ); adjudication before the International Tribunal for the Law of the Sea (ITLOS); arbitration under an arbitral tribunal in accordance with Annex VII of the LOSC; or arbitration under a special arbitral tribunal in accordance with Annex VIII of the LOSC.¹²⁵ However, none of the claimant States in the South China Sea have made a selection pursuant to article 287 of the LOSC.¹²⁶ Moreover, upon ratification of the LOSC in 1996, China made the following Declaration under article 298 of the Convention: “The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a)(b) and (c) of Article 298 of

¹²² Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 *American Journal of International Law* 142, 153.

¹²³ See *South China Sea* (29 October 2014) GlobalSecurity.org
<<http://www.globalsecurity.org/military/world/war/south-china-sea.htm>>.

¹²⁴ LOSC, art 286.

¹²⁵ LOSC, art 287.

¹²⁶ See Beckman, above n 15, 81.

the Convention.”¹²⁷ This means that China has opted out of the compulsory dispute settlement regime of the LOSC concerning maritime boundary delimitation; historic bays or titles; military activities and law enforcement activities; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it.¹²⁸

The issue of the EEZ regime is separate from the issue of maritime boundary delimitation. This is because even if all the territorial disputes in the South China Sea were resolved, States could continue to implement the EEZ regime of the LOSC differently, especially with regard to foreign military activities.¹²⁹

As at 23 September 2016, 168 States and entities have ratified or acceded to the LOSC, and only a minority of States (30 in total) continue to exercise some form of extra-sovereign control over their EEZs which might infringe foreign military activities.¹³⁰ Within the South China Sea region, only Malaysia has made a formal statement restricting foreign military activities in its EEZ. Even so, it has not enacted any domestic legislation on this issue. As discussed above, China grants foreign States the freedoms of navigation and overflight in its EEZ, but this does not include “the freedoms to conduct military and reconnaissance activities, to perform military deterrence or battlefield preparation or intelligence gathering.”¹³¹ China is the only

¹²⁷ See Declarations and Statements, above n 5.

¹²⁸ See LOSC, art 298.

¹²⁹ See Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress' (Congressional Research Service, 5 August 2014), 7.

¹³⁰ See *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements*, (23 September 2016) Oceans and Law of the Sea, United Nations < http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>; see also Pedrozo, above n 56, 522; Roach and Smith, above n 106, 379-90; Peter A. Dutton, 'Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace' (2009) 103 *American Journal of International Law* 1, 6-7.

¹³¹ Jianwei Li and Ramses Amer, 'Freedom of navigation and peaceful uses of the seas: UNCLOS, Chinese perspectives and personal thoughts ' in Wu Shicun and Zou Keyuan (eds), *Securing the Safety of Navigation in East Asia : Legal and Political Dimensions* (Chandos Publishing, 2013) , 154.

littoral State to have challenged foreign military activities in its EEZ, particularly those activities conducted by the United States. As China transitions to become a significant naval power, its naval vessels and aircraft will transit across the oceans. Therefore, for the security and safety of navigation, China will need to conduct military activities of some kind in the EEZ of other States. Indeed, the Chinese navy recently conducted a number of intelligence collection activities in foreign EEZs.¹³² Some legal commentators are of the opinion that China might change its position on foreign military activities in the EEZ of other States.¹³³ However, based on recent incidents between the United States and China in the South China Sea, it seems that even if China increases its military operations in foreign EEZs, it will continue to try to restrict foreign military activities in its own EEZ.¹³⁴ Other littoral States have actively sought to bring their domestic legislation into close conformity with the LOSC. Nevertheless, none of them have officially supported or restricted foreign military activities in their EEZ.

6.5 Conclusion

All littoral States of the South China Sea have enacted laws and regulations to implement the LOSC EEZ regime. However, in practice, these States have different interpretations, particularly those pertaining to the freedoms of navigation and overflight of foreign military vessels and aircraft. The table below summarises the

¹³² See Hsu and Murray, above n 51, 1; see also Jeremy Page, *Chinese Ship Spies on U.S.-Led Drills* (19 July 2014) The Wall Street Journal <<http://online.wsj.com/articles/chinese-ship-spies-on-u-s-led-drills-1405752404>>.

¹³³ See Julian Ryall and Cary Huang, *China ramps up maritime strategy in zone around US territory* (4 June 2013) South China Morning Post <<http://www.scmp.com/news/china/article/1252859/china-ramps-maritime-strategy>>.

¹³⁴ See Hsu and Murray, above n 51, 2; see also M Taylor Fravel, 'China's Strategy in the South China Sea' (2011) 33(3) *Contemporary Southeast Asia* 292, 307-10.

practice of South China Sea littoral States in relation to foreign military activities in the EEZ.

Table 6.1 The Practice of South China Sea Littoral States in relation to Foreign Military Activities in the EEZ

Name of State	State Practice
Brunei	Current domestic regulations do not mention foreign military activities in its EEZ.
China	Restricts foreign military activities in its EEZ.
Indonesia	Current domestic regulations do not restrict foreign military activities in the EEZ, but on a few occasions Indonesia has objected to foreign military activities in this zone.
Malaysia	Consent required for foreign military activities in the EEZ.
The Philippines	Current domestic regulations do not restrict foreign military activities in the EEZ, but on a few occasions the Philippines has objected to foreign military activities in this zone.
Taiwan	Current domestic regulations do not mention foreign military activities in its EEZ.
Vietnam	Current domestic regulations do not mention foreign military activities in its EEZ.

In order to promote stable, secure and safe navigation in the South China Sea, States should seek to not only respect international law, harmonise their domestic laws and regulations with international law provisions (and particularly those of the LOSC), but also cooperate with each other regarding the freedoms of navigation and overflight in this region. However, as States have interpreted the LOSC differently, the domestic legislation and practices of individual States are far from uniform. As a result, and due to strategic tensions outlined in Chapters Two and Three, there have been a number of incidents involving a variety of dangerous manoeuvres of sovereign immune vessels

and aircraft at sea, within the EEZs claimed by coastal States. The next chapter will analyse incidents in and over the South China Sea in greater depth.

7 INCIDENTS INVOLVING SOUTH CHINA SEA LITTORAL STATES

7.1 Introduction

Throughout the development of the international law of the sea, the freedom of navigation enjoyed by foreign States, and the jurisdiction of coastal States in maritime areas adjacent to their coastlines, have been the subject of international negotiations and debate.¹ After centuries of evaluation, compromises were made to balance the divergent interests of States, with these compromises being codified in the United Nations Convention on the Law of the Sea, 1982 (LOSC).² However, as discussed in previous chapters, States have implemented the provisions of the LOSC differently, particularly those provisions regarding the passage of sovereign immune vessels and aircraft in and over the territorial seas and the exclusive economic zones (EEZs) of coastal States. Indeed, such inconsistencies have marred other international law instruments, including the International Regulations for Preventing Collisions at Sea (COLREGs)³ and the Convention on International Civil Aviation (Chicago Convention)⁴. As a result, there have been a number of incidents at sea involving vessels and aircraft of South China Sea littoral States. This chapter will analyse selected incidents, as well as provide a table of *all* well-known incidents which have occurred in the territorial seas and claimed EEZs of South China Sea littoral States in recent years. By analysing incidents which have occurred both within the South China Sea and *outside* the South China Sea but involving South China Sea littoral States, this chapter will explore the difficulties in implementing the navigational regime of the LOSC, as well as the lack of uniformity in

¹ William K. Agyebeng, 'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea' (2006) 39 *Cornell International Law Journal* 371, 371-2.

² United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994) [hereafter LOSC].

³ Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972 (entered into force 15 July 1977) [hereafter COLREGs].

⁴ Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947).

the way States observe other international laws and regulations regarding the navigation and overflight of sovereign immune vessels and aircraft.

7.2 Incidents involving the passage of sovereign immune vessels in the territorial sea

As discussed in Chapter five, incidents involving the passage of foreign vessels in the territorial sea of coastal States have become commonplace due to the divergence in State practice. Since the entry into force of the LOSC, there has been a dearth of case law involving the innocent passage of warships. However, there have been a number of incidents reflecting the practice of South China Sea littoral States that are critically analysed in this section.

7.2.1 The “ANZAC Day incident”

On 17 April 2001, a flotilla of three Australian warships, including two frigates and a supply ship, were traversing through the Taiwan Strait when it was challenged by a Chinese warship.⁵ The Chinese captain radioed to request the flotilla leave the Taiwan Strait because it was breaching Chinese laws and intruding into China's territorial sea without prior authorisation.⁶ However, the flotilla ignored the warning and continued to sail through the strait without changing course.⁷ China then raised an official protest with the Australian Embassy in Beijing over the incident.⁸ In response, a spokesman from the Australian Department of Foreign Affairs and Trade stated: “Our position is [that] our ships were exercising their rights under the international law of the sea which provides that foreign vessels can pass through another country's territorial waters, under

⁵ Damian Grammaticas, *Stand-off in Taiwan Strait* (29 April 2001) BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/1303037.stm>>.

⁶ Ibid.

⁷ Ibid.

⁸ Aussie naval transit through Taiwan Straits protested, *China Daily* (29 April 2001) cited in Zou Keyuan, 'Disrupting or Maintaining the Marine Legal Order in East Asia' (2002) 1(2) *Chinese Journal of International Law* 449, 469; see also Sam Blay, 'Australia's warships and innocent passage' (2001) 75 *Australian Law Journal* 660, 660.

the right of innocent passage, as it's described.”⁹ Australia’s Prime Minister at the time, John Howard, asserted that there had been a “long-standing difference” between China and other States on the interpretation of the right of innocent passage. However, he noted that the passage of Australian warships on this occasion was legal and entirely in accordance with international law.¹⁰ The incident did not pose a serious problem for the bilateral relationship between China and Australia, as any residual tension was diffused through constructive dialogue.¹¹ However, it appears that differences in State practice between China and Australia regarding the innocent passage of warships continue to exist.

Indeed, this incident raises the question of whether foreign warships have the right of innocent passage in the Chinese territorial sea, and particularly in the Taiwan Strait.¹² To address this question, the status of the Taiwan Strait and the right of innocent passage as it applies to warships will be analysed.

The Taiwan Strait is a vital international shipping route connecting the East China Sea and the South China Sea. More than 170 nautical miles long, the Strait varies in width from 93 nautical miles to 116 nautical miles, with an average depth of around of 60 metres.¹³ The LOSC defines a “strait used for international navigation” as a strait which is “used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”¹⁴ However, “if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational

⁹ *Australian officials come out to coax Beijing back into better relationship* (30 April 2001) Taipei Times <<http://www.taipeitimes.com/News/front/archives/2001/04/30/0000083743>>.

¹⁰ Cited in Blay, above n 8, 660.

¹¹ Keyuan, above n 8, 469.

¹² Ibid.

¹³ Zou Keyuan, 'Redefining the Legal Status of the Taiwan Strait' (2000) 15(2) *International Journal of Marine and Coastal Law* 145, 246.

¹⁴ LOSC, art 37.

and hydrographical characteristics”, then the provisions of the LOSC applicable to a “strait used for international navigation” do not apply to the strait.¹⁵ The Taiwan Strait falls within this exception as there is an existing EEZ corridor within the strait.¹⁶ As a result, the LOSC transit passage regime does not apply to the Taiwan Strait.¹⁷ In this case, ships and aircraft transiting through the EEZ corridor of the Taiwan Strait enjoy the freedoms of navigation and overflight. However, within the bordering territorial seas of China and Taiwan, ships enjoy only the right of innocent passage, while aircraft have no such right.¹⁸

With regard to the Anzac Day incident, as the three Australian warships were passing through China’s territorial sea within the Taiwan Strait, the innocent passage regime of the LOSC applied to them. The LOSC stipulates that “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”¹⁹ However, as discussed in Chapter Five, States interpret this provision differently. While Australia applies a “rigid application of what LOSC expressly includes”, a number of States (including China) require prior authorisation for the

¹⁵ LOSC, art 36.

¹⁶ See Keyuan, above n 13, 266. Vessels can transit through the route outside the territorial seas of China and Taiwan while remaining within the Taiwan Strait. This situation is different from the Torres Strait. The Torres Strait is wider than 24 nautical miles and there are EEZ areas within the Strait. However, according to Stuart Kaye, as the only navigable route is within the territorial sea, the regime of transit passage applies to the Torres Strait. See Stuart B Kaye, 'Regulation of Navigation in the Torres Strait: Law of the Sea Issue' in Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of The Sea* (Martinus Nijhoff, 2000) .

¹⁷ Under article 38, all ships and aircraft enjoy the right of transit passage through a strait used for international navigation. Transit passage means the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, transit passage may include passage through a strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry of the particular State.

¹⁸ See James Kraska and Raul Pedroz, *International Maritime Security Law* (Koninklijke Brill NV, 2013), 224.

¹⁹ LOSC, art 17.

passage of foreign warships through their territorial seas.²⁰ The Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (China's Territorial Sea Law) states that in order to enter the territorial sea of the People's Republic of China, "foreign military ships must obtain permission from the Government of the People's Republic of China."²¹ Although this prior approval requirement is inconsistent with the LOSC, China's domestic legislation nonetheless prescribes it.²² Currently, there is no evidence suggesting that China intends on revising its domestic law regarding the innocent passage of foreign warships in its territorial sea.

As the LOSC does not contain any provisions directly addressing the passage of warships in the territorial sea of coastal States, and is silent on the requirement for prior notification or authorisation, it is understandable that States will adopt conflicting interpretations in accordance with their own strategic objectives.

The Anzac Day incident occurred just two weeks after the EP-3 incident which involved a collision between a Chinese naval F-8II fighter jet and a U.S. Navy EP-3 reconnaissance plane in the airspace above China's claimed EEZ. The collision resulted in the death of a Chinese pilot and forced the EP-3 to make an emergency landing on Hainan Island. For Zou Keyuan, the timing of the Anzac Day incident clearly indicated that "Australia...support[ed]...its American ally by sending altogether three of its warships through China's territorial sea."²³ Keyuan has also expressed the view that good intentions are an important factor when exercising the right of innocent passage, adding that "the timing and number of warships was provocative and showed no good

²⁰ Thomas Windsor, 'Innocent passage of warships in East Asian territorial seas' (2011) 3(3) *Australian Journal of Maritime and Oceans Affairs* 73, 76.

²¹ See Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (effective 25 February 1992), art 6.

²² See Keyuan, above n 13, 254.

²³ Keyuan, above n 8, 474.

intentions from the Australian side.”²⁴ This suggests that China’s protest over the incident was “inherently political rather than simply legal.”²⁵ Fortunately, the incident was handled peacefully through diplomatic representations and discussions. Sam Blay has observed that this incident highlights “the unique relationship between politics and law in international discourse.”²⁶ Even though China and Australia have different legal positions on innocent passage, the bilateral relationship between the two States “appears well insulated.”²⁷ However, Blay has conceded that “one can hardly overlook the potential for such disagreements to degenerate into major incidents and conflicts.”²⁸

The Anzac Day incident highlights the uncertainties which still exist in the LOSC regarding the innocent passage of warships. As discussed in Chapter Four, warships are included in the term “ships of all states” under Article 17, and therefore have the right of innocent passage in the territorial sea of a coastal State. As the provisions relating to innocent passage in China’s Territorial Sea Law impose restrictions on the passage of warships – restrictions which do not conform to the LOSC – incidents involving such vessels will likely continue to take place in the future.

7.2.2 The “Han incident” 2004

In the early morning of November 10, 2004, a Chinese *Han*-class nuclear-powered submarine, on its return to Meigezhuang Naval Base from its operating area in the Philippine Sea, passed submerged through the territorial sea of Japan in the Ishigaki Strait for almost two hours before leaving the Strait.²⁹ The Japanese Maritime Self-Defence Force (JMSDF) had passively tracked the submarine well before it entered

²⁴ Ibid.

²⁵ Windsor, above n 20, 78

²⁶ Blay, above n 8, 660.

²⁷ Ibid.

²⁸ Ibid 665.

²⁹ Peter A Dutton, 'International Law and the November 2004 "Han Incident"' (2006) 2(2) *Asian Security* 87, 87.

Japanese waters, but when the submarine crossed into Japan's territorial sea, a Japanese aircraft began using active sonar to track the submarine, expressly warning the submarine that it was being tracked.³⁰ However, the submarine ignored the warning and continued submerged through the strait.³¹ As a result of this intrusion, the JMSDF was put on alert under a special (high-level) security order by Defense Agency Director General Yoshinori Ono for only the second time since the end of World War II.³² The JMSDF continued tracking the submarine until it was well beyond the Japanese coastline.³³ Japan then confirmed the submarine was a Chinese nuclear-powered submarine and lodged a protest, demanding an official apology from China. Six days later, China formally responded to the incident, confirming that the submarine was a Chinese *Han*-class nuclear-powered submarine. China did not apologise for the intrusion, but rather expressed regret that the submarine had entered Japan's Ishigaki Channel for "technical reasons".³⁴ Japan quickly interpreted this as an apology from China in order to diffuse political tensions.³⁵

The incident highlights a number of international legal implications regarding the passage of foreign submarines in the territorial sea of coastal States, as well as the diverging interpretations of the LOSC adopted by coastal and maritime States.

The Ishigaki Strait lies between Japan's Ishigaki and Tarama Islands. It has a breadth of approximately 18 nautical miles and connects two parts of Japan's EEZ.³⁶

³⁰ Ibid.

³¹ Ibid.

³² Ibid 87.

³³ *China sub tracked by U.S. off Guam before Japan intrusion* (17 November 2004) The Japan Times <<http://www.japantimes.co.jp/news/2004/11/17/national/china-sub-tracked-by-u-s-off-guam-before-japan-intrusion/#.VKd-MaO4a74>>.

³⁴ Miyoshi Masahiro, 'The Submerged Passage of a Submarine through the Territorial Sea - The Incident of a Chinese Atomic-Powered Submarine' (2006) *Singapore Year Book of International Law* 243, 244.

³⁵ See Dutton, above n 29, 93; see also J Sean Curtin, *Submarine puts Japan-China ties into a dive* (Nov 17, 2004) Asia Times Online <<http://www.atimes.com/atimes/Japan/FK17Dh01.html>>.

³⁶ Dutton, above n 35, 88.

Under the LOSC, foreign submarines exercising innocent passage in the territorial sea are required to navigate on the surface and show their flag.³⁷ However, if there exists a strait used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ, and that strait overlaps with the territorial sea of a coastal State (the breadth of this type of strait is usually less than 24 nautical miles), then all ships and aircraft enjoy the right of transit passage.³⁸ Under the transit passage regime of the LOSC, ships and aircraft may transit in their “normal modes”, which means that submarines may pass through the strait submerged.³⁹ According to Japan’s Territorial Sea Law, “the territorial sea of Japan comprises the areas of the sea extending from the baseline to the line 12 nautical miles seaward thereof”, but excludes the five key straits of the Sya Kaikyo, the Tugaru Kaiky, the Tusima Kaiky Higasi Suid, the Tusima Kaiky Nisi Suid and the Osumi Kaiky.⁴⁰ In these five straits, Japan only claims a 3 nautical mile territorial sea limit, thereby leaving a sea corridor in each strait. Indeed, this suggests that Japan considers the five straits to be straits “used for international navigation”, and thus straits to which the transit passage regime applies. However, by leaving a sea corridor in each strait, Japan avoids granting transit passage rights to foreign ships and aircraft under the LOSC.

Major maritime powers, particularly the United States, do not accept Japan’s claim that there are only five straits “used for international navigation” through Japanese waters. According to the United States, the transit passage regime applies to every strait that encloses the territorial sea and is capable of navigation between two

³⁷ LOSC, art 20.

³⁸ LOSC, arts 37 & 38.

³⁹ See Sam Bateman, 'The Regime of Straits Transit Passage in the Asia Pacific: Political and Strategic Issues' in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff, 2000) , 94.

⁴⁰ Law on the Territorial Sea and the Contiguous Zone (Law No. 30 of 1977, as amended by Law No. 73 of 1996)

<<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/JPN.htm>>

parts of the high seas freedoms.⁴¹ China, on the other hand, has a restrictive view on transit passage rights. During the Third International Conference on the Law of the Sea (UNCLOS III), China expressed its support for strait States enforcing their control over straits used for international navigation.⁴² In 1973, China submitted its Working Paper on Sea Area within the Limits of National Jurisdiction to the UN Seabed Sub-Committee, stating that “[a] strait lying within the territorial sea, whether or not it is frequently used for international navigation, forms an inseparable part of the territorial sea of the coastal State.”⁴³ This suggests that China “favoured a regime of innocent passage for straits used for international navigation.”⁴⁴ When the LOSC was adopted, China made no statements or declarations. However, upon ratification of the LOSC, China made a Statement to the effect that it reserves the right to request foreign warships passing through its territorial sea to obtain advance authorisation or give prior notification.⁴⁵ Interestingly, the Statement does not mention the regime of transit passage. According to Zou Keyuan, the reason for this is that there is no “strait used for international navigation” in China’s territorial sea.”⁴⁶ Nevertheless, China, like Japan, has adopted a restrictive approach when defining the phrase “straits used for international navigation.” Indeed, an official People’s Liberation Army (PLA) publication on international law expresses the view that transit passage rights only apply

⁴¹ See Peter Dutton, 'Scouting, Signaling, and Gatekeeping: Chinese Naval Operations in Japanese Waters and the International Law Implications' (2009) 2(February) *China Maritime Studies* 1, 14.

⁴² Keyuan, above n 13, 254.

⁴³ See UN Doc. A/Ac 138/SC II/L 34 in Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford, Clarendon Press, 1992), 230.

⁴⁴ Keyuan, above n 13, 255.

⁴⁵ See *Declarations and Statements* (29 October 2013) United Nations <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>.

⁴⁶ Keyuan, above n 13, 259.

to straits which “straddle important international sea lanes” and which have “important implications for the national interests of certain countries.”⁴⁷

Japan claims a 12 nautical mile territorial sea in the Ishigaki Strait, but does not categorise this strait as a “strait used for international navigation.” As a result, Japan applies the innocent passage regime in the Ishigaki Strait. Therefore, according to Japan, the submerged passage of a Chinese *Han*-class submarine through the Ishigaki Strait violated Japan’s sovereignty. As a result of this intrusion, the JMSDF used destroyers and anti-submarine warfare (ASW) aircraft to track the submarine for more than two hours, with the surveillance continuing until the submarine was well beyond the Japanese coastline.⁴⁸ As China did not argue that its submarine transited submerged through the Ishigaki Strait in “normal mode”, it may be assumed that China has the same view as Japan – that is, that the Ishigaki Strait is not a “strait used for international navigation”, and thus not a strait to which transit passage rights apply. Only if the Ishigaki Strait is not a “strait used for international navigation”, would the submerged passage of the Chinese submarine through the territorial sea of Japan be clearly inconsistent with article 20 of the LOSC. For Miyoshi Masahiro, China’s unwillingness to issue a formal apology for the intrusion means that it failed to carry out its State responsibility under international law.⁴⁹

Another implication of China only expressing regret over the *Han* incident is that it demonstrates that China is resisting a wide interpretation of “straits used for international navigation”. Indeed, even though China may be transitioning to a maritime

⁴⁷ See Zhao Peiying (ed), *The Basis of International Law for Modern Soldiers* (Beijing: PLA Press, 1996), 90 cited in Dutton, above n 41, 14.

⁴⁸ Dutton, above n 29, 88.

⁴⁹ Masahiro, above n 34, 244.

power with a blue water navy, it still adheres to a restrictive view on the passage of foreign warships through its coastal waters.⁵⁰

As China did not use the *Han* incident to embrace a more expansive interpretation of transit passage rights, what did it seek to accomplish by sending a submerged submarine through Japan's territorial sea? This question is particularly pertinent if one considers that *Han*-class submarines are fairly noisy and easily detected. China explained that the incident occurred due to technical reasons, and Japan officially accepted this explanation. However, after examining the waters of the Ishigaki Strait, as well as the actual voyage of the submarine through the Ishigaki Strait, Peter Dutton has opined that China's explanation for the intrusion was just "a face-saving cover."⁵¹ Indeed, Dutton has suggested several possible reasons for the intrusion, including a covert mapping exercise, a demonstration of China's sea power, or perhaps even an opportunity to test the anti-submarine warfare capability of the JMSDF.⁵² Whatever the reason(s), the submerged passage of a Chinese submarine through Japan's territorial sea undercuts China's restrictive and long-held position on the passage of foreign warships in the waters adjacent to coastal States.⁵³ Japan, on the other hand, acted quickly to demand an official apology from China, thereby strengthening its restrictive definition of "straits used for international navigation", as well as to demonstrate its willingness to use military power to protect its national security and interests.⁵⁴

Suffice to say, the incident spurred mutual distrust between the two States. The Japanese Defense Agency expressed the view that the "intrusion of a Chinese submarine

⁵⁰ Dutton, above n 41, 16.

⁵¹ Ibid 19.

⁵² Ibid 17-25.

⁵³ Dutton, above n 29, 98-99.

⁵⁴ Ibid.

into Japan's territorial waters was a highly provocative act by the Chinese Navy.”⁵⁵ Even though the incident did not lead to military confrontation, it did increase Japan's growing suspicion of China's intentions and objectives in the region, and led to Japan adopting a tougher political stance against China.⁵⁶

The 2004 “*Han*-incident” reveals the divergent interpretations of international law which States often adopt, as well as the communication difficulties experienced by States when discussing security incidents. The incident also highlights that the covert nature of submarine operations, hence, some States would prefer their submarines to transit submerged (provided navigational conditions allow for this). However, as unidentified submarines detected in the territorial sea could be considered a security threat by coastal States, serious consequences could stem from situations which are not well-managed. Therefore, better communication, including military exchanges and dialogue among armed forces operating in sensitive areas, is necessary in order to avoid small incidents triggering a crisis.⁵⁷

7.3 Incidents involving the passage of sovereign immune vessels and aircraft in the EEZ

As discussed in previous chapters, within the EEZ all vessels and aircraft enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft [etc].”⁵⁸ However, in practice, States have different interpretations of the LOSC EEZ regime. One of the more

⁵⁵ See Nao Shimoyachi, *Chinese submarine intrusion considered an act of provocation* (13 November 2004) The Japan Times <<http://www.japantimes.co.jp/news/2004/11/13/national/chinese-submarine-intrusion-considered-an-act-of-provocation/#.VLivkaO4a74>>.

⁵⁶ See Mark Magnier, *China Regrets Sub Incident, Japan Says* (17 November 2004) Los Angeles Times <<http://articles.latimes.com/2004/nov/17/world/fg-sub17>>.

⁵⁷ Ibid 56.

⁵⁸ LOSC, arts 58 & 87.

controversial issues is foreign military activities in the EEZ. Some coastal States want to restrict activities of foreign military vessels and aircraft in their EEZ, while maritime user States consider military activities to be part of the freedoms of navigation and overflight granted by the LOSC. Apart from disputes over military activities in the EEZ, the disregard of international instruments such as COLREGs and the Chicago Convention by sovereign immune vessels and aircraft has resulted in incidents involving South China Sea littoral States. This section will analyse a number of incidents which have occurred in the EEZs of coastal States in order to highlight uncertainties and gaps in international law concerning the passage rights of sovereign immune vessels and aircraft in the EEZ.

7.3.1 The EP-3 incident

On 1 April 2001, a Chinese F-8 fighter jet collided with a U.S. Navy EP-3 surveillance aircraft in the South China Sea.⁵⁹ The incident occurred approximately 70 nautical miles off the coast of China's Hainan Island, in the airspace above China's claimed EEZ.⁶⁰ The incident resulted in the Chinese F-8 fighter jet crashing into the sea, killing the pilot on board.⁶¹ The EP-3 was seriously damaged and was forced to make an emergency landing on Hainan Island.⁶² Upon landing, all 24 crew members were taken into custody and the EP-3 was examined by the Chinese.⁶³ A "solemn representation and protest" was lodged by China's Foreign Ministry against the United States government on April 1 in relation to the collision, and a further protest was lodged on

⁵⁹ Shirley A Kan, 'China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications' (Congressional Research Service, October 2001), 1.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Margaret K. Lewis, 'An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident' (2002) 77 *New York University Law Review* 1404, 1409.

April 2 alleging infringement by the United States of China's sovereignty and airspace.⁶⁴ China's Foreign Ministry Spokesman at the time, Zhu Bangzao, argued that the surveillance flight went far beyond the scope of EEZ overflight permitted under international law, amounting to an abuse of the principle of overflight freedom.⁶⁵ Bangzao added that the U.S. plane had violated international flight rules causing the crash, and thus the United States should bear full responsibility for the incident. He further asserted that by entering China's territorial airspace and landing at a Chinese airport without China's approval, the EP-3 had violated both international law and Chinese domestic laws, forfeiting the sovereign immunity which may otherwise have attached to the military aircraft.⁶⁶ Following the incident, China's then-President, Jiang Zemin, made a public statement demanding the United States accept full responsibility for the collision, apologise for the incident, and cease its reconnaissance flights in the airspace close to China's coast.⁶⁷ In response to China's demands and protests, the United States contended that the crash was caused by the F-8 pilot flying in a risky manner. Even so, the United States said that it was sorry for the loss of the Chinese pilot and aircraft, and for the EP-3 entering China's airspace and landing on Hainan Island without verbal clearance.⁶⁸ However, the United States also asserted that the EP-3 aircraft made an "emergency landing after following international emergency procedures."⁶⁹ Despite the United States saying "sorry", it is clear they did not accept legal responsibility for the incident. On a CBS talk show on April 8, 2001, U.S. Secretary of State Colin Powell declared that "we've expressed sorrow for it, and we're

⁶⁴ See *FM Spokesman Gives Full Account of Air Collision* (4 April 2001) <<http://www.china.org.cn/english/2001/Apr/10070.htm>>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Kan, above n 59, 3.

⁶⁸ See *Letter from U.S. Ambassador Joseph W. Prueher to Chinese Minister of Foreign Affairs Tang Jiaxuan*. (April 10 2001) ABC NEWS <<http://abcnews.go.com/International/story?id=81253>>.

⁶⁹ Ibid.

sorry that that happened, but it can't be seen as an apology, accepting responsibility.”⁷⁰ He also added that “our reconnaissance flights, when we fly them, how we will fly them in international air space over international waters will be something that the United States government will decide.”⁷¹

After 11 days of exchanging views through diplomatic and political channels, all crew members aboard the EP-3 aircraft were released. However, it took three months for the disassembled EP-3 to be returned to the United States.⁷² China requested \$1 million for costs associated with the incident, but the U.S. Department of Defense offered a “non—negotiable” amount of \$34,567.00 as a “fair figure for services rendered and assistance in taking care of the aircrew and some of the materials and contracts, and what not, to remove the EP-3 itself.”⁷³

As China and the United States blamed each other for the violation of international law, no negotiated agreement was reached. The incident was not brought before any court or tribunal, nor did it lead to further deterioration in the bilateral relationship between the two States.

The incident reveals a number of uncertainties in international law, including: (i) the types of military activities that can be carried out by sovereign immune aircraft above the EEZ of a coastal State; (ii) the rules of the air applicable to military aircraft; and (iii) the sovereign immune status of military aircraft in cases which call for an emergency landing on foreign State territory.

⁷⁰ See *Face the Nation Transcript - April 8, 2001* (April 8, 2001) CBS NEWS <<http://www.cbsnews.com/news/ftn-transcript-april-8-2001/>>.

⁷¹ Ibid.

⁷² Lewis, above n 63, 1410.

⁷³ *U.S. Pays China for Spy Plane Incident* (August 9, 2001) ABC NEWS <<http://abcnews.go.com/International/story?id=80651>>.

Under the LOSC, all foreign aircraft, whether civilian or military, enjoy the freedoms of overflight and of laying of submarine cables and pipelines, “and other internationally lawful uses of the sea related to these freedoms” over the EEZ of a coastal State.⁷⁴ According to Andrew Williams, this implies that “the right of overflight is not limited to mere transit over the EEZ but that aircraft may perform operations previously permitted under international law.”⁷⁵ However, in exercising their rights and performing their duties, foreign military aircraft shall have “due regard” to the rights and duties of the coastal State.⁷⁶ Moreover, the LOSC makes it clear that:

In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.⁷⁷

The United States is yet to ratify the Convention. However, as the EEZ now forms part of customary international law, the LOSC EEZ regime undoubtedly applies to the United States.⁷⁸ Indeed, with the exception of deep seabed mining provisions, the United States Ocean Policy respects LOSC provisions precisely because the Convention accurately reflects customary international law.⁷⁹

⁷⁴ LOSC, art 58 & 87.

⁷⁵ Andrew S Williams, 'Aerial Reconnaissance by Military Aircraft in the Exclusive Economic Zone' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) , 49.

⁷⁶ LOSC, art 58.

⁷⁷ LOSC, art 301.

⁷⁸ See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*: Judgment of the Court, ICJ, 3 June 1985. The International Court of Justice (ICJ) confirmed that “the institution of the exclusive economic zone...is shown by the practice of states to have become part of customary law...”; R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 1999), 161. Most commentators appear to agree that the EEZ became part of customary international law before the entry into force of the LOSC; see also Presidential Proclamation No. 5030 by the President of the United States of America (entered into force March 10, 1983). It can be seen from President Reagan’s statement that the U.S. accepts many aspects of the LOSC as customary international law.

⁷⁹ See *United States Ocean Policy, Statement by the President. March 10, 1983*
<<http://www.state.gov/documents/organization/143224.pdf>>.

With regard to the EP-3 incident, China argued that the EP-3's reconnaissance acts went far beyond the scope of "overflight", thus abusing the freedom of overflight and causing a serious threat to China's security interests.⁸⁰ The United States acknowledged the "due regard" requirement but argued that military surveillance flights over the EEZ of coastal States are lawful acts under international law.⁸¹ China's restrictive view on military activities in the EEZ has been supported by a number of coastal States, including Brazil, India, Bangladesh, Malaysia and Pakistan.⁸² However, other maritime States hold the same view as the United States, including Germany, Italy, the Netherlands and the United Kingdom.⁸³

As the LOSC does not contain any provisions directly addressing military activities in the EEZ, it is to be expected that China and the United States will adopt interpretations which suit their own interests. However, it is important to note that the sovereign rights of coastal States in the EEZ (as specified in article 56 of the LOSC), are limited to the "waters superjacent to the seabed and of the seabed and its subsoil", and this does not include the airspace above the EEZ.⁸⁴ Many authors have argued that as the airspace above the EEZ is not part of the EEZ, and the LOSC provides no provisions regarding military activities in this particular zone, all aircraft enjoy the freedom of overflight (and thus the ability to conduct military aviation activities).⁸⁵

⁸⁰ See *FM Spokesman Gives Full Account of Air Collision*, above n 64.

⁸¹ See *The Commander's Handbook on the Law of Naval Operations* (Department of Defense, The United States, 2007), 2-12. The Handbook provides that "military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels."

⁸² See *Declarations and Statements* (29 October 2013) Oceans and the Law of the Sea <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

⁸³ Ibid.

⁸⁴ LOSC, art 56; see also Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 9, 12.

⁸⁵ See Chris Rahman and Martin Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' (2010) 41(4) *Ocean Development & International Law* 315, 325; Pedrozo, above n 84,

Moreover, as China has been conducting a number of surveillance activities in the EEZs of other States, including the U.S. EEZs around Guam and Hawaii, it is doubtful whether China's practice is consistent with its restrictive views on foreign military activities in its own EEZ.⁸⁶

Regarding the collision, China and the United States agreed that China has the right to monitor the operations of aircraft over its EEZ, but they blamed each other for the risky manoeuvres of each other's pilots. According to China, "the United States plane suddenly veered at a wide angle toward the Chinese plane", and "by veering and ramming the Chinese jet at a wide angle, against flight rules, the U.S. surveillance plane caused the crash of the Chinese jet."⁸⁷ The U.S. countered this accusation by saying that the EP-3 "was on auto-pilot, and did not deviate from a straight and level path until it had been hit by the Chinese fighter aircraft."⁸⁸ In addition, the United States contended that the F-8 made two aggressive passes within three to five feet of the EP-3, and that it was on the third pass that the F-8 approached "too fast and closed on the EP-3", thus causing the collision.⁸⁹

Given the differing accounts of the collision and the lack of an impartial observer, it is impossible to definitively conclude which State was at fault.⁹⁰ However, it is important to note that all aircraft must operate with "due regard" for the safety of other aircraft. The Chicago Convention, which has been signed and ratified by both the

12; Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 *Australian Yearbook of International Law* 93, 104; see also Bernard H Oxman, 'Transit of Strait and Archipelagic Waters by Military Aircraft' (2000) 4 *Singapore Journal of International & Comparative Law* 377, 395.

⁸⁶ See U.S. Department of Defense, 'Annual Report to Congress on China's Military Power, Military and Security Developments Involving the People's Republic of China 2013' (2013), 39.

⁸⁷ See *FM Spokesman Gives Full Account of Air Collision*, above n 64.

⁸⁸ See *Secretary Rumsfeld Briefs on EP-3 Collision* (April 13, 2001) U.S. Department of Defense <<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1066>>.

⁸⁹ *Ibid.*

⁹⁰ See Lewis, above n 63, 1427; see also Eric Donnelly, 'The United States-China EP-3 Incident: Legality and Realpolitik' (2004) 9(1) *Journal of Conflict & Security Law* 25, 29.

United States and China, prescribes that “[an] aircraft shall not be operated in such proximity to other aircraft as to create a collision hazard.”⁹¹ Unfortunately, the Chicago Convention contains no provisions regarding the operation of State aircraft, including military aircraft, beyond the land areas and territorial waters of a coastal State. And although the Convention requires States to ensure their state aircraft operate with due regard for the safety of navigation of civil aircraft, there are no provisions addressing the interaction between state aircraft in international airspace.⁹² The collision thus reveals a startling gap in international law regarding the rules of the air applicable to military aircraft in international airspace in times of peace.

In relation to the landing of the EP-3 on Hainan Island, China contended that “it was illegal for the U.S. military spy plane to enter China's territorial space and to land at a Chinese airport without China’s approval.”⁹³ Therefore, this act “constituted an infringement upon China’s sovereignty and territorial space.”⁹⁴ It is clear that the EP-3 landed on Chinese territory without verbal clearance. However, the United States explained that the EP-3 aircraft made an “emergency landing after following international emergency procedures.”⁹⁵ U.S. Secretary of Defense at the time, Donald Rumsfeld, noted that the EP-3 had made approximately 25 attempts to broadcast Mayday and distress signals to alert the world and Hainan Island of the collision, but

⁹¹ See International Civil Aviation Organization, *Rules of the Air* (International Civil Aviation Organization, 2005), 3-2.

⁹² Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947), art 3.

⁹³ See *FM Spokesman Gives Full Account of Air Collision*, above n 64.

⁹⁴ *Ibid.*

⁹⁵ See *Letter from U.S. Ambassador Joseph W. Prueher to Chinese Minister of Foreign Affairs Tang Jiaxuan*, above n 68.

that it was unclear whether or not these distress signals had been acknowledged by China.⁹⁶

Whether a military aircraft in distress may land on a foreign State's territory without prior authorisation is unclear. Article 3 of the Chicago Convention provides that "[n]o State aircraft of a contracting State shall fly over the territory of another State, or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."⁹⁷ In cases of distress, *civil* aircraft may land on a foreign state's territory without prior authorisation; however, the Chicago Convention contains no provisions regarding distressed *military* aircraft.⁹⁸ There is no international treaty that grants military aircraft in distress the right to enter the territory of a foreign State without prior approval. Under the LOSC, all ships in distress, including warships, have the right to enter a foreign State's port for the purpose of rendering assistance without losing their sovereign immunity.⁹⁹ Some authors argue that by analogy, military aircraft should have the right to land on foreign territory when necessitated by distress.¹⁰⁰ However, other authors take the view that military aircraft do not have the right to make emergency landings in a foreign State without permission.¹⁰¹ State practice regarding this issue appears to support the United States perspective. The United States authorises emergency landings by foreign military or state aircraft without a clearance procedure "if, in the opinion of the installation commander, denial of a landing request could

⁹⁶ See Gerry J. Gilmore, *Chinese Jet Struck Navy EP-3 Aircraft, Rumsfeld Says* (April 13, 2001) U.S. Department of Defense <<http://www.defense.gov/news/newsarticle.aspx?id=44955>>.

⁹⁷ Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947), art 3.

⁹⁸ Ibid art 25.

⁹⁹ See LOSC, arts 18 & 32; see also Churchill and Lowe, above n 78, 63.

¹⁰⁰ See Kan, above n 59, 20; Lewis, above n 63, 1428; see also Donnelly, above n 90, 37.

¹⁰¹ See Jao Xiaoyang, *US Attitude Arrogant, Irresponsible* cited in Lewis, above n 63, note 145; see also Michael N. Schmitt, 'Clipped Wings: Effective and Legal No - fly Zone Rules of Engagement' (1988) 20 *Loyola of Los Angeles International and Comparative Law Review* 727, 785. The author notes that the "right of military aircraft to claim force majeure entry is unsettled".

endanger the safety of the aircraft or its crew.”¹⁰² In 1974, a Soviet AN-24 reconnaissance aircraft made an emergency landing at Gambell Airfield in Alaska. The United States allowed the aircraft to be refuelled the next day and to depart without the aircraft or its crewmembers being detained.¹⁰³ Similarly, in 2015, a Pakistan Air Force aircraft carrying five military personnel was allowed to make an emergency landing at Chowdhury Charan Singh airport in India for the purpose of refuelling.¹⁰⁴

As the EP-3 incident was resolved without any negotiated agreement and without the matter being brought before any court or tribunal, it is hard to draw any conclusion regarding the legal responsibilities and liabilities of each side. However, it is clear that China and the United States will continue to interpret international law in ways which suit their own strategic interests. China will continue to apply its restrictive view on foreign military activities in the EEZ, while the United States will continue to conduct military activities in other State’s EEZs by asserting the freedoms of navigation and overflight granted by customary international law and the LOSC.¹⁰⁵

With the inherent ambiguities of the LOSC, as well as the existing international law gaps regarding the rules of the air applicable to sovereign immune aircraft, similar incidents to the EP-3 collision may occur in the future. In order to avoid such incidents, States should work together to produce an agreement on the interpretation of the LOSC in this area, as well as devise pragmatic measures for the safe overflight of sovereign immune aircraft at sea.

¹⁰² See *OPNAV Instruction 3700.19E* (24 July 2014) Department of the Navy <<http://doni.daps.dla.mil/Directives/03000%20Naval%20Operations%20and%20Readiness/03-700%20Flight%20and%20Air%20Space%20Support%20Services/3700.19E.pdf>>.

¹⁰³ See *Secretary Rumsfeld Briefs on EP-3 Collision*, above n 88.

¹⁰⁴ See *Pak airforce plane lands at Lucknow for refueling* (Jan 26, 2015) *The Economic Times* <http://articles.economictimes.indiatimes.com/2015-01-26/news/58470054_1_pakistan-air-force-chittagong-landing>.

¹⁰⁵ See Pedrozo, above n 84, 27-29; Kan, above n 59, 7; Williams, above n 75, 61; Raul Pedrozo, 'Close Encounters at Sea: The USNS Impeccable Incident' (2009) 62(3) *Naval War College Review*, 109; see also Lewis, above n 63, 1438-39.

7.3.2 The *Impeccable* incident

On 8 March, 2009, a U.S. ocean surveillance ship, the USNS *Impeccable*, was conducting routine operations in the South China Sea when it was surrounded and harassed by a collective of five Chinese vessels, including a naval vessel, an oceanographic patrol vessel, a government fisheries surveillance vessel, and two fishing trawlers.¹⁰⁶ According to the United States, only a day earlier a Chinese naval ship had “challenged *Impeccable* via bridge-to-bridge radio broadcast, calling the U.S. vessel’s operations illegal and directing it to leave the area or ‘suffer the consequences.’”¹⁰⁷ On 8 March 2009, two Chinese ships manoeuvred within 25 feet of *Impeccable* and then intentionally stopped “directly ahead of [the vessel], forcing *Impeccable* to conduct an emergency “all stop” in order to avoid collision.”¹⁰⁸ The incident occurred approximately 75 nautical miles from the coast of Hainan Island, in China’s claimed EEZ. Following the incident, the American Embassy in Beijing lodged an official protest with the Chinese government, and a Pentagon spokesman made a statement characterizing China’s actions as “unprofessional”, “dangerous” and as constituting a “violation(s) under international law to operate with due regard for the rights and safety of other lawful users of the ocean.”¹⁰⁹ In response to the protest from the United States, a Chinese Foreign Ministry spokesman, Ma Zhaoxa, propounded that *Impeccable* had “conducted activities in China’s special economic zone in the South China Sea without China’s permission”, describing the claims of the United States as “gravely in

¹⁰⁶ See Jonathan G. Odom, 'The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (outside of China) Should be Concerned.' (2010) 18(3) *Michigan State Journal of International Law* 1, 6; see also Raul Pedrozo, above n 105, 102.

¹⁰⁷ Tony Capaccio, *Chinese Vessels Harass U.S. Navy Ship, Pentagon Says (Update3)* (March 9, 2009) Bloomberg <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aUMS9YLJ2OmM>>.

¹⁰⁸ See Yuli Yang, *Pentagon says Chinese vessels harassed U.S. ship* (March 9, 2009) CNN <http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html?_s=PM:POLITICS>.

¹⁰⁹ See Kevin Baron, *Pentagon: Five Chinese vessels harass U.S. ship* (March 10, 2009) Stars and Stripes <<http://www.stripes.com/news/pentagon-five-chinese-vessels-harass-u-s-ship-1.89046>>.

contravention of the facts and confus[ing] black and white...they are totally unacceptable to China.”¹¹⁰ Ma also added that “[we] demand that the United States put an immediate stop to related activities and take effective measures to prevent similar acts from happening.”¹¹¹

On 9 March 2009, White House spokesman Robert Gibbs confirmed that U.S. Navy ships would “continue to operate in those international waters, and we expect the Chinese to observe international law around that.”¹¹² Indeed, *Impeccable* returned to the area the next day to continue its survey work – this time with the escort of a guided missile destroyer, the USS *Chung-Hoon*.¹¹³

The *Impeccable* incident led to increased tensions between the United States and China, with the two States accusing each other of violating international law.¹¹⁴ The incident brings to the fore not only the legal question of whether States may conduct military activities in a foreign State’s EEZ, but also the safety of maritime navigation under international law.

The *Impeccable* is an ocean surveillance ship which directly supports the U.S. Navy to detect and track undersea threats using both passive and active sonar.¹¹⁵ After the incident, the Pentagon protested to China, stating that:

¹¹⁰ See Thom Shanker and Mark Mazzetti, *China and U.S. Clash on Naval Fracas* (March 10, 2009) The New York Times <http://www.nytimes.com/2009/03/11/world/asia/11military.html?_r=0>.

¹¹¹ Don Lee, *China says U.S. provoked naval confrontation* (March 11, 2009) Los Angeles Times <<http://articles.latimes.com/2009/mar/11/world/fg-china-sea-confrontation11>>.

¹¹² Ann Scott Tyson, *U.S. Protests Chinese Shadowing in International Waters* (March 10, 2009) The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/09/AR2009030900956.html>>.

¹¹³ Ann Scott Tyson, *Navy Sends Destroyer to Protect Surveillance Ship After Incident in South China Sea* (March 13, 2009) The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/12/AR2009031203264.html>>.

¹¹⁴ See also Vaudine England, *Who's right in South China Sea spat?* (13 March 2009) BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/7941425.stm>>.

¹¹⁵ See *Special Mission* (accessed 7 February 2015) U.S.Navy's Military Sealift Command <<http://www.msc.navy.mil/pm2/>>.

We believe firmly that what that naval ship was doing in those international waters is not only fully consistent with international law, it is common practice. And we hope that the Chinese would behave in a similar way, that is, according to international law.¹¹⁶

According to the United States, military activities are part of those internationally lawful uses of the sea associated with the freedom of navigation under Article 58 of the LOSC. Therefore, “[c]oastal States do not have a right under international law to regulate foreign military activities in the EEZ.”¹¹⁷ China, on the other hand, argued that the activities of the *Impeccable* in China’s EEZ took place “without [their] permission” and “have broken international laws as well as China’s laws and regulations.”¹¹⁸ On 10 March 2009, a press conference was held to elucidate the specific international and Chinese laws that had been contravened by the *Impeccable* incident. Chinese Foreign Ministry Spokesperson, Ma Zhaoxu, stated that:

While answering the questions, I mentioned three laws: UN Convention on the Law of the Sea, Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf, and Regulations of the People’s Republic of China on the Management of Foreign-related Marine Scientific Research.¹¹⁹

Both China and the United States agreed that the incident occurred in China’s claimed EEZ; however, as the United States is not a party to the LOSC, its statement used the term “international waters” rather than EEZ. The United States also substituted the terms “international law” and “common practice” for “the LOSC”. However, as

¹¹⁶ *DoD News Briefing with Geoff Morrell from the Pentagon* (March 11, 2009) U.S. Department of Defense <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4369>>.

¹¹⁷ *RAW DATA: Pentagon Statement on Chinese Incident With U.S. Navy* (March 09, 2009) FOX NEWS <<http://www.foxnews.com/politics/2009/03/09/raw-data-pentagon-statement-chinese-incident-navy/>>.

¹¹⁸ See *Foreign Ministry Spokesperson Ma Zhaoxu's Regular Press Conference on March 10, 2009* (March 11, 2009) Permanent Mission of the People's Republic of China to the UN <<http://www.china-un.org/eng/fyrth/t541713.htm>>.

¹¹⁹ *Ibid.*

discussed above, since the EEZ now forms part of customary international law, it is clear that the EEZ provisions in the LOSC would apply to the United States.¹²⁰

According to some authors, military uses of the sea are lawful pursuant to customary international law, and the LOSC affirms this by confining such activities to the territorial seas, archipelagic waters, and straits used for international navigation, but not in the EEZ.¹²¹ The United States view is that:

Military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, ship and aircraft operations and conducting surveys, are recognized high seas uses that are preserved by Article 58.¹²²

Therefore, the United States was firmly of the view that the activities of the *Impeccable* were fully consistent with international law. China, on the other hand, did not officially refer to any specific provisions of the LOSC to support its position regarding the *Impeccable* incident. However, some Chinese scholars have proffered an explanation for China's position based on certain provisions of the LOSC. Ji Guoxing proposed that the military survey activities conducted by the *Impeccable* in China's EEZ "violated the fundamental principle" of the LOSC on "peaceful uses of the sea."¹²³ Ji added that the *Impeccable* was involved in collecting military information, and that such conduct constituted a threat against China's territorial integrity and political

¹²⁰ See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*: Judgment of the Court, ICJ, 3 June 1985. The International Court of Justice (ICJ) confirmed that "the institution of the exclusive economic zone...is shown by the practice of states to have become part of customary law..."; see also Churchill and Lowe, above n 78, 161. Most commentators appear to agree that the EEZ became part of customary international law before the entry into force of the LOSC.

¹²¹ See Raul Pedrozo, above n 105, 103; Ian Townsend-Gault and Clive Schofield, 'Hardly Impeccable Behavior: Confrontations between Foreign Ships and Coastal States in the EEZ' (2009) 5(1) *International Zeitschrift* 1, 4; Odom, above n 106, 29-30; see also UNCLOS, arts 19, 20, 39, 40 & 52).

¹²² See George V. Galdorisi and Kevin R. Vienna, *Beyond the Law of the Sea: New Directions for U.S. Ocean Policy* (Praeger publishers, 1997), 151.

¹²³ Ji Guoxing, 'The Legality of the "Impeccable Incident"' (2009) 5(2) *China Security* 16, 18; see also LOSC, art 301 which states that: "In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations".

independence, thus breaching the “peaceful purposes” provision of the LOSC.¹²⁴ As the LOSC provides neither a definition nor any criteria for “peaceful purposes”, this argument is hardly convincing. According to Rahman and Tsamenyi, “no sound argument can be made in the context of the LOS Convention, or any other international legal instrument, that peacetime surveillance activities in the EEZ threaten either the territorial integrity or political independence of any coastal state.”¹²⁵ According to Sam Bateman, as the *Impeccable* is classified as an “ocean surveillance vessel” and is used for collecting information for purely military purposes (and thus not marine scientific research), its activities were not under coastal State jurisdiction but rather formed part of the freedom of navigation on the high seas – a freedom which under the LOSC extends to an EEZ.¹²⁶ Bateman also has expressed the view that “military uses of the seas are a recognized right under international law, and it would be difficult for China to sustain an argument that the activities of these ships posed a direct threat to its national security.”¹²⁷ In support of this view, Stuart Kaye has pointed to the *San Remo Manual on the Law of Armed Conflict at Sea* – a document which reflects customary international law and confirms that armed conflict can take place in the EEZ of a neutral State. Therefore, it is difficult to assert that military surveillance activities in a foreign state’s EEZ are contrary to international law.¹²⁸

Another viewpoint which supports China’s position on the *Impeccable* incident is that “military survey activities are completely subsumed under the category of study

¹²⁴ Ibid.

¹²⁵ Rahman and Tsamenyi, above n 85, 327.

¹²⁶ Sam Bateman, 'A Response to Pedrozo: The wider Utility of Hydrographic Survey' (2011) *Chinese Journal of International Law* 177, 184-85.

¹²⁷ Sam Bateman, 'Clashes at Sea: When Chinese Vessels Harass U.S. Ships' 13 March 2009 *RSIS Commentaries*, 2.

¹²⁸ See Kaye, above n 85, 102; see also Louise Doswald Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (Cambridge University Press, 1995), 8.

called marine scientific research.”¹²⁹ Under the LOSC, marine scientific research in the EEZ and on the Continental Shelf “shall be conducted with the consent of the coastal State.”¹³⁰ However, the LOSC does not define the term “marine scientific research.” Zhang Haiwen has argued that there is almost no difference between the scientific instruments and equipment on board U.S. naval data collection vessels, and those on board normal marine scientific research vessels, making it is difficult to identify the real purposes and uses of the collected data.¹³¹ Indeed, this has led Zhang to assert that “marine data collecting activities conducted in the EEZ could be categorized as marine scientific research which is subject to the jurisdiction of the coastal State.”¹³² However, the United States distinguishes between marine scientific research (which requires coastal State consent), and hydrographic and military surveys (which come under the freedom of navigation and do not require the consent of coastal states).¹³³ Other authors support the U.S. view by arguing that “if the whole incident arose from China’s desire to keep its 200 nautical mile limit clear of foreign warships, then it was acting beyond its rights at international law.”¹³⁴

Apart from the legal debate over the activities conducted by the *Impeccable* in China’s claimed EEZ, the incident raises concerns over the safety of navigation at sea. Article 94 of the LOSC stipulates that every State shall take necessary measures to

¹²⁹ Yu Zhirong, 'Jurisprudential Analysis of the U.S. Navy’s Military Surveys in the Exclusive Economic Zones of Coastal Countries' in Peter Dutton (ed), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (U.S. Naval War College, 2010) vol 7, 43.

¹³⁰ LOSC, art 246.

¹³¹ Zhang Haiwen, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? -Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) *Chinese Journal of International Law* 31, 38.

¹³² Ibid, 36.

¹³³ See Mark Valencia, 'The Impeccable Incident: Truth and Consequences' (2009) 5(2) *China Security* 26, 27; see also *The Commander's Handbook on the Law of Naval Operations*, above n 81. The Handbook states that: “the coastal nation cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.”

¹³⁴ Townsend-Gault and Schofield, above n 121, 6.

ensure that ships flying its flag observe the applicable international regulations relating to the prevention of collisions at sea.¹³⁵ All sea going vessels, except submarines, are bound by the rules set out in COLREGs. These Regulations, which are commonly known as “the rules of the road” or navigation rules, make it clear that the ship’s commander must strictly comply with COLREGs and “the ordinary practice of seamen” to avoid a collision.¹³⁶ In regard to the *Impeccable* incident, Admiral Timothy Keating stated that “[t]he *Impeccable* incident is certainly a troubling indicator that China, particularly in the South China Sea, is behaving in an aggressive, troublesome manner and [is] not willing to abide by acceptable standards of behavior or ‘rules of the road.’”¹³⁷ The United States became a party to COLREGs on 15 July 1977, while China became a party on 7 January 1980.¹³⁸ The COLREGs’ rules apply to all vessels, including sovereign immune vessels, “upon the high seas and in all waters connected therewith navigable by seagoing vessels.”¹³⁹ The COLREGs entered into force before the LOSC; however, as noted in Chapter Four, the reference to “all navigable waters connected to the high seas” in COLREGs would clearly include the new EEZ regime.¹⁴⁰ With regard to the *Impeccable* incident, Odom has contended that two of the Chinese vessels “unilaterally created a risk of collision with the *Impeccable* by failing to ‘keep out of the way’ and crossing its bow, even though the circumstances gave them ample opportunity to avoid doing so.”¹⁴¹ Odom has further proposed that if a collision had occurred, the Chinese vessels would have been solely responsible, as they had created a

¹³⁵ LOSC, art 94.

¹³⁶ Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972 (entered into force 15 July 1977) [hereafter COLREGs], rule 2(a).

¹³⁷ Donna Miles, *More Work Needed in Military Relationship With China, Admiral Says* (March 19, 2009) U.S. Department of Defense <<http://www.defense.gov/news/newsarticle.aspx?id=53559>>.

¹³⁸ See *IMO Documentation* (accessed on February 10, 2015) Australian Maritime Safety Authority <<https://imo.amsa.gov.au/public/parties/colreg72.html>>.

¹³⁹ COLREGs, rule 1.

¹⁴⁰ Odom, above n 106, 18.

¹⁴¹ *Ibid* 20.

risk-of-collision situation themselves.¹⁴² In the aftermath of the incident, the United States released photos and video footage showing the two Chinese vessels intentionally stopping ahead of *Impeccable*. However, China refuted the U.S. accusation, stating that “[t]he U.S. assertion is flatly inaccurate and unacceptable to China.”¹⁴³ The incident, however, raises significant concerns about the safety of maritime navigation, particularly the extent to which sovereign immune vessels observe the “rules of the road”. The incident also reveals that flag States may be unwilling to enforce the provisions of COLREGs when an incident involves their own sovereign immune vessels. The incident also involved China’s fishing vessels. However, as this type of “irregular” fishing vessels were used to support China’s maritime claims, it is unlikely that China will enforce the COLREGs provisions on them.

Unlike the EP-3 incident, the *Impeccable* incident resulted in neither a collision nor the loss of life. However, the incident was considered a “trigger point” for the most serious confrontation between the United States and China since the EP-3 incident in 2001.¹⁴⁴ Thankfully the incident did not escalate into a full scale international crisis, but in the absence of any ruling by the International Court of Justice (ICJ) or any other tribunal, it is difficult to derive from the incident any broadly accepted principle on military activities in a foreign state’s EEZ.

With the *Impeccable* incident taking place eight years after the EP-3 incident, it is clear that neither the United States nor China intend to change their stance regarding

¹⁴² Ibid.

¹⁴³ See *Foreign Ministry Spokesperson Ma Zhaoxu's Regular Press Conference*, above n 118; for more information on these photos and video footage, see Jonathan G. Odom, 'The "Case" of USNS Impeccable Versus 5 Chinese Ships: A Close Examination of the Fact, the Evidence, and the Law' in Jon M. Van Dyke et al (eds), *Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park* (Martinus Nijhoff Publishers, 2013) .

¹⁴⁴ See Guoxing, above n 123, 16; see also Anil Dawar, *Naval standoff threatens US-China military relations* (13 March 2009) The Guardian <<http://www.theguardian.com/world/2009/mar/13/us-china-naval-standoff>>.

military activities in EEZs. Indeed, this ambiguity in international law allows States to continue adopting conflicting interpretations which suit their own strategic interests. To avoid similar incidents from occurring in the future, coastal and maritime States should strive for an international agreement on military activities in the EEZ of foreign States, as well as ensuring that their vessels respect internationally accepted standards on the safety of navigation.

7.3.3 *Haiyang Shiyou-981* Oil Rig Crisis 2014

On 2 May 2014, the state-owned China National Offshore Oil Corporation (CNOOC) placed the *Haiyang Shiyou 981* (HYSY 981) oil rig at 15°29'58"N; 111°12'06"E to conduct exploratory drilling, with the rig being moved to 15°33'38"N; 111°34'62"E on 27 May 2014.¹⁴⁵ Both of these locations lie well within the EEZ and continental shelf claimed by Vietnam, approximately 130-150 nautical miles off the Vietnamese coast.¹⁴⁶ To support the operation of the rig, China deployed approximately 80 escort vessels to the area, including seven military ships and a number of military aircraft.¹⁴⁷ In response, Vietnam dispatched approximately 30 law enforcement vessels, including patrol vessels of the Vietnamese Coast Guard and surveillance vessels of the Fisheries Bureau, Ministry of Agriculture and Rural Development. These vessels issued warnings to the Chinese contingent and demanded that the rig be removed from

¹⁴⁵ See *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyou 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam* (7 July 2014) Consulate of the Socialist Republic of Vietnam in New York, The United States of America <<http://vietnamconsulate-ny.org/news/2014/07/position-paper-viet-nam-chinas-illegal-placement-haiyang-shiyou-981-oil-rig-exclusive>>.

¹⁴⁶ Ibid.

¹⁴⁷ Ernest Z Bower and Gregory B Poling, *China-Vietnam Tensions High over Drilling Rig in Disputed Waters* (7 May 2014) Center for Strategic & International Studies <<http://csis.org/publication/critical-questions-china-vietnam-tensions-high-over-drilling-rig-disputed-waters>>; see also *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyou 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam*, above n 145.

Vietnam's EEZ and continental shelf.¹⁴⁸ Vietnam also sent *Notes Verbales* and communicated with Chinese authorities at various levels more than 30 times with regard to China's provocative placement of the oil rig and its deployment of escort vessels within Vietnam's claimed EEZ. Indeed, Vietnam contended that these actions infringed Vietnam's sovereign rights and jurisdiction, and were in violation of international law.¹⁴⁹ China argued that the oil rig was placed 17 nautical miles from Triton Island (*Đảo Tri Tôn* in Vietnamese and *Zhongjian* Island in Chinese), in the Paracel Island group (*Quần đảo Hoàng Sa* in Vietnamese and *Xisha* Islands in Chinese) and over which China claims "indisputable" sovereignty.¹⁵⁰

As discussed in Chapter Two, the Paracel Islands have been controlled by China since 1974.¹⁵¹ As China, Taiwan and Vietnam all claim sovereignty over all the Paracel Islands, one can state with confidence that there is a sovereignty dispute over this maritime area, thus refuting China's claim of "indisputable" sovereignty.

On 5 May 2014, vessels from China's Maritime Safety Administration (MSAC) established a three nautical mile exclusion zone around HYSY 981.¹⁵² During this maritime standoff, Vietnam accused China's coast guard ships of aggressively firing high-powered water cannons at, and intentionally ramming, Vietnamese ships while Chinese aircraft circled above Vietnamese law enforcement vessels.¹⁵³ Vietnam later

¹⁴⁸ See Bower and Poling, above n 147; see also Tomotaka Shoji, *Vietnam and China over the South China Sea: The confrontation proceeds towards a new phase* (2 July 2014) World Affairs <<http://www.worldaffairsjournal.org/content/vietnam-and-china-over-south-china-sea-confrontation-proceeds-towards-new-phase>>.

¹⁴⁹ See *Position paper of Viet Nam on China's illegal placement of Haiyang Shiyu 981 oil rig in the Exclusive Economic Zone and Continental Shelf of Viet Nam*, above n 145.

¹⁵⁰ See *The Operation of the HYSY 981 Drilling Rig: Vietnam's Provocation and China's Position* (08 June 2014) Ministry of Foreign Affairs of the People's Republic of China <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1163264.shtml>.

¹⁵¹ *Ibid* 189.

¹⁵² See U.S Senate Resolution S. RES.412 (113th Congress).

¹⁵³ *Chinese aircraft intimidate Vietnam's law enforcement vessels* (21 June 2014) Vietnamnet <<http://english.vietnamnet.vn/fms/government/105605/chinese-aircraft-intimidate-vietnam-s-law-enforcement-vessels.html>>; see also *Chinese ships ram Vietnamese vessels in latest oil rig row: officials*

released photos and video footage showing the Chinese vessels engaging in such conduct – conduct which ultimately injured many law enforcement officers and led to several Vietnamese vessels sustaining damage. As *Tuoitrenews* reported, by 27 June 2014, the attack had caused damage to 29 Vietnamese marine law enforcement vessels, seven Vietnamese fishing boats, and resulted in 17 Vietnamese fisheries surveillance officers sustaining injuries.¹⁵⁴ In particular, on 1 June, 2014, China Coast Guard vessel No. 46105 fired water cannons at, and rammed, Vietnamese Coast Guard vessel No.2016 12 nautical miles from the oil rig, breaking four holes in the starboard side of the Vietnamese vessel 40-50 cm above its waterline.¹⁵⁵ On 23 June 2014, Vietnamese fisheries surveillance vessel *KN-951* was operating in an area approximately 11 nautical miles from the rig when it was surrounded by seven Chinese ships, including Chinese marine surveillance vessels and tug boats. One of the Chinese tug boats, named *Bin Hai* 285, intentionally rammed the *KN-951*, causing serious damage to the ship and injuring two fisheries surveillance officers.¹⁵⁶ In the most serious attack, which took place on 26 May 2014, Vietnam state television broadcast a video showing Chinese vessel No. 11209 ramming and sinking a Vietnamese fishing boat *DNa 90152*, which was conducting normal fishing activity in Vietnam's claimed EEZ, approximately 17 nautical miles from the oil rig. The broadcast accused China of not only violating the prohibition against the use of force under international law, but also of inhumane

(07 May 2014) Thanhnien News <<http://www.thanhniennews.com/politics/chinese-ships-ram-vietnamese-vessels-in-latest-oil-rig-row-officials-26069.html>>.

¹⁵⁴ See *Chinese vessels hit Vietnam's ship twice, injuring 2 officers* (24 June 2014) *Tuoitrenews* <<http://tuoitrenews.vn/society/20552/chinese-vessels-hit-vietnamese-ship-twice-injuring-2-officers>>.

¹⁵⁵ See *Vietnam International press conference on East Sea developments* (5 June 2014) Vietnam law guide <<http://vietlaw4u.com/vietnam-international-press-conference-east-sea-developments/>>.

¹⁵⁶ See *Chinese ships damage Vietnamese fisheries surveillance vessel* (23 June 2014) Vietnam Breaking News <<http://www.vietnambreakingnews.com/2014/06/chinese-ships-damage-vietnamese-fisheries-surveillance-vessel/>>; see also *Press release of MFA Vietnam on June 26th 2014* (27 June 2014) Consulate of the Socialist Republic of Vietnam in New York <<http://vietnamconsulate-ny.org/news/2014/06/press-release-mfa-viet-nam-june-26th-2014>>.

actions against seafarers.¹⁵⁷ China, on the other hand, accused Vietnamese vessels of deliberately ramming Chinese government ships more than 1400 times.¹⁵⁸ However, unlike Vietnam, China provided neither photos nor video footage to support its accusation.

The 75-day maritime standoff ended on 16 July 2014, when China decided to withdraw the drilling rig from the contested area a month ahead of its scheduled move on 15 August. According to China National Petroleum Corporation, the rig was removed as it had completed its work earlier than scheduled.¹⁵⁹

In a letter from the Permanent Representative of Vietnam to the UN Secretary-General dated 7 May 2014, Vietnam reaffirmed that:

[t]he area where the oil rig HYSY 981 and other Chinese protection vessels are operating lies entirely within the exclusive economic zone and continental shelf of Vietnam; and the operation of the oil rig HYSY 981 and other Chinese protection vessels seriously infringes upon Vietnam's sovereignty, sovereign rights and jurisdiction as enshrined under the United Nations Convention on the Law of the Sea of 1982, [and] violates the Declaration on the Conduct of Parties in the South China Sea of 2002...¹⁶⁰

In response, on 9 June 2014, in a letter from the Permanent Mission of China to

¹⁵⁷ See Dean Yates and Nick Macfie, *Video shows Vietnam fishing boat sink after collision with Chinese vessel* (5 June 2014) Reuters <<http://www.reuters.com/article/2014/06/05/us-southchinasea-vietnam-idUSKBN0EG0X020140605>>; see also *Vietnamese TV shows sinking of fishing boat in South China Sea* (5 June 2014) The Telegraph <<http://www.telegraph.co.uk/news/worldnews/asia/vietnam/10877706/Vietnamese-TV-shows-sinking-of-fishing-boat-in-South-China-Sea.html>>.

¹⁵⁸ See *The Operation of the HYSY 981 Drilling Rig: Vietnam's Provocation and China's Position*, above n 150.

¹⁵⁹ See Teddy Ng and Kristine Kwok, *Oil rig stops exploration work near disputed Paracel Islands a month early* (17 July 2014) South China Morning Post <<http://www.scmp.com/news/china/article/1555221/china-says-oil-rig-finishes-mission-waters-vietnam>>; see also Gregory B. Poling, *China's Oil Rig Removal and the ASEAN Regional Forum* (24 July 2014) Center for Strategic & International Studies <<http://csis.org/publication/chinas-oil-rig-removal-and-asean-regional-forum>>.

¹⁶⁰ Annex to the letter dated 7 May 2014 from the Permanent Representative of Vietnam to the United Nations addressed to the Secretary-General (A/68/870).

the UN Secretary-General, China argued that oil rig HYSY 981 was located 17 nautical miles from *Zhongjian* island (Triton island) of the *Xisha* Islands (Paracel Islands) which are “an inherent part of China’s territory, over which there is no dispute.”¹⁶¹ China also urged Vietnam to “respect China’s sovereignty, sovereign rights and jurisdiction, immediately stop all forms of disruption of the Chinese operation and withdraw all vessels and personnel from the site.”¹⁶²

To properly assess this incident, there are three main legal questions that need to be answered. Firstly, was the oil rig located in disputed waters? Secondly, if so, did China violate international law and the Declaration on the Conduct of Parties in the South China Sea of 2002 (DOC) by placing the oil rig in such waters? And lastly, did the activities of the Chinese vessels contravene international law?

In relation to the first question, it is clear that both Vietnam and China provided evidence (by way of letters to the UN Secretary-General) to support their sovereignty claims over the Paracel Islands. While Vietnam conceded that the area has long been the subject of a sovereignty dispute, China maintained that no such dispute exists. The purpose of this section is not to determine which country has the stronger legal argument regarding sovereignty claims over the Paracel Islands. Indeed, it suffices to say that many governments, academics and legal experts accept that these islands are the subject of overlapping claims.¹⁶³ China’s claim that the oil rig was placed 17

¹⁶¹ Annex to the letter dated 9 June 2014 from the Chargé d’affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General (A/68/907).

¹⁶² Ibid.

¹⁶³ Many texts, government documents and journal articles have analysed the sovereignty dispute over Paracel Islands, e.g. United States Department of State *Limits in the Seas: China Maritime Claims in the South China Sea* (December 5, 2014); Clive Schofield, ‘What’s at stake in the South China Sea? Geographical and geopolitical considerations’ in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) ; Raul Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea* (CNA Occasional Paper, August 2014); Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (Springer, 2000).

nautical miles from Triton Island in the Paracels (i.e., within the contiguous zone generated from Triton Island) is also questionable. Triton Island is 1.2 km² of sand and coral cay and cannot “sustain human habitation or [an] economic life” of its own.¹⁶⁴ Accordingly, it could be classified as a “rock”, in which case it is only entitled to a 12 nautical mile territorial sea under the LOSC.¹⁶⁵ Under this classification, Triton Island cannot have a contiguous zone of its own. Moreover, under the LOSC, a coastal state’s sovereign rights over its natural resources, including exploration drilling, falls under the regime of the EEZ, not the contiguous zone.¹⁶⁶ Most importantly, the oil rig was placed approximately 130 nautical miles from the coastline of Vietnam, well inside the EEZ claimed by Vietnam in accordance with the LOSC. In summary, as both China and Vietnam claim sovereignty over the Paracel Islands, any maritime zone generated from this archipelago is still in dispute. Even if one assumes that Triton Island belongs to China, it cannot have an EEZ of its own. From any perspective, the weight of evidence points to the conclusion that oil rig HYSY 981 was located in disputed waters.

Turning to the second question, as the HYSY 981 was in a disputed area, it is clear that China violated international law, particularly the LOSC. Articles 74(3) and 83(3) of the LOSC stipulate that if no agreement can be reached for the delimitation of the EEZ and continental shelf, “the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of

¹⁶⁴ Nguyen Thi Lan Anh, 'The Paracels: Forty Years On' (9 June 2014) *RSIS Commentaries* .

¹⁶⁵ LOSC, art 121. This article states that “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”.

¹⁶⁶ LOSC, arts 38 & 56. Under article 33 of the LOSC, in the contiguous zone the coastal State has a limited right to exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and no rights over natural resources.

the final agreement.”¹⁶⁷ In the 2007 *Guyana v Suriname* case, which was brought under LOSC Annex XV, the Permanent Court of Arbitration ruled that unilateral drilling in an area of overlapping claims is a violation of articles 74(3) and 83(3) of the LOSC.¹⁶⁸ Bower and Poling have argued that as HYSY 981 was clearly in a disputed area, China violated the LOSC by unilaterally engaging in drilling operations.¹⁶⁹ Carlyle Thayer has also asserted that “China’s decision to deploy a mega oil rig in waters forming part of the Vietnamese Exclusive Economic Zone (EEZ) was unexpected, provocative and, in my professional opinion, illegal, although there is substantial international dispute over this issue.”¹⁷⁰ In summary, by unilaterally placing the oil rig in a disputed area, it is clear that China acted in violation of international law.

On the question of whether the DOC was contravened by China’s actions, as the DOC is a political statement and not a legal binding document, it cannot be used as a reference for settling legal disputes. However, in the Position Paper of the Government of the People’s Republic of China on the matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippine, China stated that:

China wishes to emphasize that the DOC is an important instrument, adopted by China and the ASEAN member States...Under the DOC, the parties concerned undertake to resolve their territorial and jurisdictional disputes through friendly consultations and negotiations...reaffirm their respect for and commitment to the freedom of navigation in and overflight above, the South China Sea as provided for by universal principles of international law...and undertake to exercise self-restraint in the conduct of activities

¹⁶⁷ LOSC, arts 74(3) and 83(3).

¹⁶⁸ See Yoshifumi Tanaka, 'The Guyana/Suriname Arbitration: A Commentary' (2007) 2(3) *Hague Justice Journal* 28, 31; see also Robert Beckman, 'The Dispute Settlement Procedures UNCLOS – Implications for the Dispute between Viet Nam & China' (Paper presented at the Legal Issues regarding the China’s Placement of the Oil Rig Haiyang Shiyu 981 in Viet Nam’s EEZ and CS, Ho Chi Minh City, Vietnam, 2014).

¹⁶⁹ See Bower and Poling, above n 147.

¹⁷⁰ Carlyle Thayer, *China-Vietnam Oilrig Crisis and Strategic Trust* (30 June 2014) China US Focus <<http://www.chinausfocus.com/foreign-policy/china-vietnam-oilrig-crisis-and-strategic-trust-2/>>.

that would complicate or escalate disputes...¹⁷¹

As China urges Parties to the DOC to exercise self-restraint in the conduct of activities in disputed areas, China's contradictory tactic of placing the HYSY 981 oil rig in disputed waters clearly violated not only the spirit of the DOC but also the principle of good faith in international law.

On the third question, it is clear that the Chinese vessels violated a number of international law instruments, particularly the LOSC and COLREGs. Firstly, under the LOSC, a coastal State may establish reasonable safety zones around artificial islands, installations and structures, but these safety zones must not exceed a distance of 500 metres.¹⁷² Therefore, the U.S. Senate resolved that the establishment of an exclusion zone with a radius of 3 nautical miles round the oil rig, and the aggressive patrols conducted by Chinese vessels in this area, "undermines maritime safety in the area and is in violation of universally recognized principles of international law."¹⁷³ Secondly, under the COLREGs, a ship's commander must strictly comply with the COLREGs and "the ordinary practice of seamen" to avoid collision.¹⁷⁴ As Jonathan G. Odom has commented, States may have conflicting views on maritime boundaries and jurisdictions; however, their vessels and mariners are all bound by the rules set out in the COLREGs.¹⁷⁵ The act of Chinese vessels aggressively patrolling and intentionally ramming Vietnamese law enforcement vessels in Vietnam's claimed EEZ is clearly a violation of the COLREGs.¹⁷⁶

¹⁷¹ See *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (12 July 2014) Ministry of Foreign Affairs of the People's Republic of China

<http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

¹⁷² LOSC, art 60.

¹⁷³ See U.S Senate Resolution S. RES.412 (113th Congress).

¹⁷⁴ COLREGs, rule 2(a).

¹⁷⁵ Odom, above n 106, 18.

¹⁷⁶ See also U.S Senate Resolution S. RES.412 (113th Congress).

7.4 Other incidents in the South China Sea involving sovereign immune vessels and aircraft

In addition to the incidents discussed above, there have been other clashes in the South China Sea involving sovereign immune vessels and aircraft. These incidents reveal the need for more careful management of such vessels and aircraft in the region.

On 11 June 2009, a Chinese navy submarine hit the towed array sonar of the destroyer USS *John McCain* near Subic Bay, approximately 144 miles off the coast of the Philippines.¹⁷⁷ The submarine and the destroyer did not collide; however, the array was damaged.¹⁷⁸ Although neither side made an official statement, the general consensus was that the collision was not intentional.¹⁷⁹ According to Jonathan G. Odom, however, at the time of the collision China “was apparently conducting military surveillance operations in the exclusive economic zone of another nation – in this case the Philippines.”¹⁸⁰ This incident demonstrates again that China’s practice is inconsistent with its restrictive views on foreign military activities in its own EEZ.

In June 2010, an Indonesian patrol boat captured a Chinese fishing vessel fishing illegally in the Indonesian South China Sea EEZ claimed from Natuna Island. In response, a Chinese maritime law enforcement vessel, the *Yuzheng 311*, pointed its large-calibre machine gun at the Indonesian boat to force the release of the captured vessel.¹⁸¹ In March 2013, an Indonesian law enforcement vessel boarded a Chinese fishing boat operating in Indonesia’s claimed EEZ, arresting nine fishermen. A Chinese law enforcement vessel, the *Yuzheng 310*, arrived on the scene and threatened and

¹⁷⁷ David Carter and Erik Slavin, *USS McCain arrives at Sasebo after suffering damage to sonar array* (June 17, 2009) Stars and Stripes <<http://www.stripes.com/news/uss-mccain-arrives-at-sasebo-after-suffering-damage-to-sonar-array-1.92521>>.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid; Barbara Starr, *Sub collides with sonar array towed by U.S. Navy ship* (June 12, 2009) CNN <<http://edition.cnn.com/2009/US/06/12/china.submarine/>>.

¹⁸⁰ Odom, above n 143, 337.

¹⁸¹ *NIDS China Security Report 2011* (National Institute for Defense Studies, Japan, 2012), 19.

harassed the Indonesian vessel, forcing it to release the Chinese prisoners.¹⁸² Most recently, in March 2016, an Indonesian law enforcement vessel captured a Chinese fishing boat operating in the same general area, arresting all nine crew members. As the Indonesian vessel began towing the Chinese boat to Natuna Island, a China Coast Guard vessel arrived and rammed the fishing boat, freeing it from Indonesian authorities.¹⁸³ Indonesia lodged a formal protest with China's Embassy in Jakarta, but China insisted that the area where the incident took place was "traditional Chinese fishing grounds."¹⁸⁴ It is clear that under the LOSC coastal States enjoy sovereign rights over natural resources in their EEZs. Therefore, China's assertion of "traditional Chinese fishing grounds" in another State's EEZ clearly contravenes the LOSC.

On 26 May 2011, three ships from China Marine Surveillance (numbered 12, 17 and 84) intentionally cut a cable towing seismic equipment by a Vietnamese seismic survey vessel, the *Binh Minh 02*, at a coordinate of 12°18'25" latitude North; 111°26'48" longitude East, approximately 120 nautical miles from the Vietnamese coastline and well within Vietnam's claimed EEZ.¹⁸⁵ The following day, Vietnam lodged a diplomatic protest with China's Ambassador, claiming that the actions of the three China Marine Surveillance ships violated Vietnamese sovereign rights in its EEZ and

¹⁸² Scott Bentley, *Mapping the nine-dash line: recent incidents involving Indonesia in the South China Sea* (29 October 2013) Australian Strategic Policy Institute <<http://www.aspistrategist.org.au/mapping-the-nine-dash-line-recent-incidents-involving-indonesia-in-the-south-china-sea/>>.

¹⁸³ Joe Cochrane, *China's Coast Guard Rams Fishing Boat to Free It From Indonesian Authorities* (21 March 2016) New York Times <http://www.nytimes.com/2016/03/22/world/asia/indonesia-south-china-sea-fishing-boat.html?_r=0>.

¹⁸⁴ Ibid.

¹⁸⁵ See *Tàu Trung Quốc ngang ngược xâm phạm vùng đặc quyền kinh tế Việt Nam* (27 May 2011) VNExpress (in Vietnamese) <<http://vnexpress.net/tin-tuc/thoi-su/tau-trung-quoc-ngang-nguoc-xam-pham-vung-dac-quyen-kinh-te-viet-nam-2196171.html>> ; see also Carlyle A Thayer, 'Navigating the currents of legal regimes and realpolitik in East Asia's maritime domain' in Wu Shicun and Zou Keyuan (eds), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions* (Chandos Publishing, 2013) , 32.

on its continental shelf, as well as violating the LOSC and the spirit of the DOC.¹⁸⁶ In response, Foreign Ministry Spokeswoman Jiang Yu stated: “What relevant Chinese departments did was completely normal marine law-enforcement and surveillance activities in China’s jurisdictional sea area.”¹⁸⁷ However, China did not clarify the legal basis for this water area being “[within] China’s jurisdictional sea area.” By contrast, Vietnam’s Foreign Ministry Spokesperson, Nguyen Phuong Nga, made it clear on 29 May 2011 that:

[t]he area where Vietnam conducted explorations is entirely within the 200-nautical mile exclusive economic zone and continental shelf of Vietnam as stipulated by the 1982 UN Convention on the Law of the Sea. This is neither a disputed area nor an area "managed by China." China is intentionally misleading the public opinion into thinking it is a disputed area.¹⁸⁸

Unfortunately China did not clarify what it meant by “China’s jurisdictional sea area”, but it could have been a veiled reference to the area within the nine-dash line. In this context, it is important to note that on 12 July 2016, the Arbitral Tribunal in the Philippine case ruled that “China’s claims to historic rights, or other sovereign rights or jurisdiction.....encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention [LOSC] and without lawful effect.”¹⁸⁹

Putting to one side the dispute over waters claimed by China and Vietnam, it is clear that the three Chinese marine surveillance ships violated COLREGs. Under COLREGs, the *Binh Minh 02* was a vessel with restricted-manoeuve status, while the

¹⁸⁶ See *VN condemns Chinese intrusion* (28 May 2011) Vietnamnet <<http://english.vietnamnet.vn/fms/government/8551/vn-condemns-chinese-intrusion.html>>.

¹⁸⁷ Quoted in *China opposes Vietnam oil, gas exploration in China's jurisdictional sea area: FM spokeswoman* (28 May 2011) Xinhuanet <http://news.xinhuanet.com/english2010/china/2011-05/28/c_13899118.htm>.

¹⁸⁸ See *Vietnam demands China Stop Sovereignty Violations* (29 May 2011) Thanh Nien News <<http://www.thanhniennews.com/2010/pages/20110530011353.aspx>>.

¹⁸⁹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [278].

Chinese ships were “power driven vessels.” Therefore, according to article 18 of the COLREGs, the Chinese vessels were required to keep clear of the the *Binh Minh 02*.¹⁹⁰ In fact, the Chinese ships deliberately cut the towing cable of the *Binh Minh 02*, ignoring the warning signal from the Vietnamese captain.¹⁹¹ China claimed that the conduct of their law enforcement ships “was completely normal marine law-enforcement and surveillance activities.”¹⁹² This suggests that China refuses to take any responsibility for the unsafe conduct of its government-operated vessels – conduct which is contrary to international regulations, and perhaps even instruct them to take such action.

One of the most recent incidents involving sovereign immune vessels occurred on 9 July 2016, when two China Coast Guard vessels (46102 and 56103), were accused of ramming and sinking a Vietnamese fishing boat in the vicinity of the Paracel Islands.¹⁹³ Moreover, after sinking the Vietnamese fishing boat, the two Chinese vessels allegedly prevented another Vietnamese fishing vessel from rescuing the fishermen from the sunken vessel.¹⁹⁴ Such action by Chinese law enforcement vessels, if indeed it occurred as reported, not only violates rules of safe navigation under international law, particularly the LOSC, the COLREGs and the SOLAS, but also constitutes unacceptable behaviour in maritime practice.

In 2012, China and the Philippines were involved in a two-month standoff at

¹⁹⁰ See COLREGs, art 18.

¹⁹¹ See Alex Watts, *Vietnam accuses China of sabotage* (2 June 2011) The Sydney Morning Herald <<http://www.smh.com.au/world>>. The captain, Alexander Belov, was heard yelling: "This is Binh Minh 02 trying to contact you. You are acting very stupidly and dangerously. Stay away of the cable! Stay away of the cable!" Captain Belov then ordered a horn to be sounded several times.

¹⁹² Quoted in *China reprimands Vietnam over offshore oil exploration* (28 May 2011) Reuters <<http://af.reuters.com/article/energyOilNews/idAFL3E7GS07E20110528>>.

¹⁹³ Dong Nguyen, *Chinese vessels sink Vietnamese fishing boat near Paracel Islands* (10 July 2016) VNEXPRESS <<http://e.vnexpress.net/news/news/chinese-vessels-sink-vietnamese-fishing-boat-near-paracel-islands-3433910.html>>.

¹⁹⁴ Ibid.

Scarborough Shoal, over which both countries claim sovereignty. The incident was prompted by two Chinese marine surveillance vessels preventing a Philippine warship, the BRP *Gregorio del Pilar*, from arresting eight Chinese fishing vessels engaged in alleged illegal fishing at the shoal.¹⁹⁵ The following day, and having realised the inherent risk of using a warship during a standoff with China, the Philippines withdrew the *Gregorio del Pilar*, replacing it with a small coast guard vessel.¹⁹⁶ By contrast, China dispatched one of its largest and most advanced fishery patrol vessels, the *Yuzheng 310*, to reinforce its presence.¹⁹⁷ During the standoff, three Chinese law enforcement ships surrounded a small Philippine coast guard vessel. According to Rahman, China's vessels also conducted a number of dangerous manoeuvres that threatened the safety of the Philippine vessel and crew.¹⁹⁸ In mid-June 2012, while consultations between China and the Philippines were on foot, the two States decided to withdraw their vessels from the area due to a seasonal typhoon.¹⁹⁹ However, after the typhoon, China sent its vessels back to the shoal, with these vessels having maintained a permanent presence, and hence securing effective control, ever since.²⁰⁰ On 27 January 2014, a Chinese coast guard vessel fired a water cannon at Philippine fishing boats near the shoal to drive them away from the area.²⁰¹ In February 2015, the Philippines lodged a protest with China after a Chinese coast guard ship deliberately rammed and damaged

¹⁹⁵ Renato Cruz De Castro, 'China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff' (Paper presented at the Conference for the Managing Tensions in the South China Sea, CSIS 5-6 June 2013), 5.

¹⁹⁶ Ibid.

¹⁹⁷ Renato Cruz De Castro, 'The 2012 Scarborough Shoal Stand-Off: from Stalemate to escalation of the South China Sea dispute' in Leszek Buszynski and Christopher B. Roberts (eds), *The South China Sea Maritime Dispute: Political, legal and regional perspectives* (Routledge, 2015)

¹⁹⁸ Personal discussion with Associate Professor Chris Rahman (Australian National Centre for Ocean Resources and Security, University of Wollongong, Australia, 19 October 2015), based on his viewing of a PCG video of the incident.

¹⁹⁹ Castro, above n 195, 9.

²⁰⁰ M. Taylor Fravel, *China's Island Strategy: "Redefine the Status Quo."* (1 November 2012) The Diplomat <<http://thediplomat.com/2012/11/chinas-island-strategy-redefine-the-status-quo/>>.

²⁰¹ *Philippines says China 'fired water cannon' on Filipino fishermen* (24 February 2014) BBC <<http://www.bbc.com/news/world-asia-26320383>>.

three Philippine fishing vessels in the shoal.²⁰² In April 2015, the Philippines accused China's coast guard of firing water cannons at, and damaging, a number of Philippine fishing vessels in the shoal.²⁰³ China defended the actions of its coast guard, asserting that "official Chinese vessels in waters near the Huangyan island (Scarborough Shoal) carried out their duties and managed the relevant waters according to law."²⁰⁴ Setting aside sovereign disputes over the shoal, it is clear that firing water cannons at fishing vessels in disputed waters is not only provocative behaviour but also inhumane, as it has the capacity to endanger the lives of fishermen.

The Philippine submission to the arbitral tribunal in the South China Sea arbitration shed further light on the dangerous operation of Chinese law enforcement vessels. On 28 April 2012, while the Philippine Coast Guard Ship BRP *Pampanga* was stationary in the vicinity of Scarborough Shoal, a China Fisheries and Law Enforcement vessel, the *FLEC 310*, approached it "from port to almost dead ahead at a distance of about 600 yards with speed of 20.3 knots."²⁰⁵ Another incident occurred on 26 May 2012, when *MCS 3008*, a vessel of the Philippine Bureau of Fisheries and Aquatic Resources, approached Scarborough Shoal. A Chinese marine surveillance vessel, *CMS 71*, increased its speed and attempted to cross *MCS 3008* from its port bow at a distance less than 100 yards, forcing the *MCS 3008* to increase its speed to 20 knots and to alter its course to starboard "to evade a possible impact."²⁰⁶ Following this incident, three other Chinese vessels, including *FLEC 303*, *CMS 84* and *FLEC 306*, joined *CMS 71* to

²⁰² Manuel Mogato and Mark Heinrich, *Philippines says Chinese ship rammed fishing boats in Scarborough Shoal* (4 February 2015) Reuters <<http://www.reuters.com/article/2015/02/04/us-philippines-china-idUSKBN0L81IM20150204>>.

²⁰³ Nick Macfie, *China defends vessels' actions against Philippines in South China Sea* (22 April 2015) Reuters <<http://uk.reuters.com/article/2015/04/22/uk-southchinasea-china-philippines-idUKKBN0ND0WV20150422>>.

²⁰⁴ Quoted in *ibid*.

²⁰⁵ Quoted in *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [1048].

²⁰⁶ *Ibid* [1051].

manoeuvre dangerously around *MCS 3008*.²⁰⁷ In response to the incident, the Philippines requested that the arbitral tribunal declare that “China...breached its obligations under the Convention (LOSC) by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.”²⁰⁸ In its award, the arbitral tribunal ruled that:

...the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal finds China to have violated Rules 2, 6, 7, 15, and 16 of the COREGS and, as a consequence, to be in breach of Article 94 of the Convention (LOSC).²⁰⁹

On 5 December 2013, a U.S. guided missile cruiser, the *USS Cowpens*, was shouldered by a Chinese amphibious ship while monitoring the Chinese aircraft carrier *Liaoning* in the South China Sea. According to the United States, during this interaction the Chinese vessel suddenly crossed the bow of the *USS Cowpens* at a distance of less than 100 yards, forcing it to take evasive action to avoid a collision.²¹⁰ At the time of the incident, the *Cowpens* was operating approximately 32 nautical miles southeast of Hainan Island, and therefore the United States asserted that its ship was conducting lawful activities consistent with customary international law as reflected in the LOSC.²¹¹ At a press briefing on 19 December 2013, U.S. Secretary of Defense, Chuck Hagel, categorically stated that “*that* action by the Chinese, cutting in front of [our] ship, 100 yards out in front of the *Cowpens*, was not a responsible action. It was

²⁰⁷ Ibid [1053]-[1058].

²⁰⁸ Ibid [1044].

²⁰⁹ Ibid [1109].

²¹⁰ See Department of Defense, 'Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2014' (2014), 4.

²¹¹ Ibid.

unhelpful. It was irresponsible (emphasis added).”²¹² The U.S. Pacific Fleet also issued a statement that “this incident underscores the need to ensure the highest standards of professional seamanship, including communications between vessels, to mitigate the risk of an unintended incident or mishap.”²¹³ China, however, did not provide any official comment in relation to the incident. According to Bateman, “COLREGs can be twisted to one’s advantage”, without all the details of the incident being available, it is impossible to know which version of events is correct.²¹⁴ Nevertheless, Bateman warned that the incident has led to strategic mistrust between the two countries.²¹⁵ Another analyst, Ian Storey, has also forecast a dire view of the region, suggesting that “if China continues to challenge the presence of foreign naval ships in the South China Sea, it is only a question of time before a serious and potentially deadly incident occurs.”²¹⁶

On 19 August 2014, a Chinese *Shenyang* J-11B fighter jet intercepted a U.S. Navy P-8 patrol aircraft over the South China Sea. The incident occurred in international airspace approximately 135 miles east of Hainan Island.²¹⁷ According to Pentagon spokesman Real Admiral John Kirby, the interception was “very close, very dangerous...pretty aggressive and very unprofessional.”²¹⁸ However, China’s Defense

²¹² *Department of Defense Press Briefing by Secretary Hagel and General Dempsey in the Pentagon Briefing Room* U.S Department of Defense

<<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5345>>.

²¹³ Quoted in David Lerman and Anthony Capaccio, *Chinese Military Ship Confronts U.S. Cruiser at Sea* (14 December 2013) Bloomberg <<http://www.bloomberg.com/news/articles/2013-12-13/chinese-military-ship-confronts-u-s-cruiser-at-sea>>.

²¹⁴ Sam Bateman, 'The USS Cowpens Incident: Adding to Strategic Mistrust' (23 December 2013) *RSIS Commentaries* , 2.

²¹⁵ Ibid.

²¹⁶ Quoted in John Hofilena, *US, China warships narrowly avoid collision in South China Sea* (17 December 2013) Japan Daily Press <<http://japandailynews.com/us-china-warships-narrowly-avoid-collision-in-south-china-sea-1741082/>>.

²¹⁷ Christopher P. Cavas, *Chinese Fighter Buzzes US Patrol Aircraft* (22 August 2014) Defense News <<http://archive.defensenews.com/article/20140822/DEFREG02/308220025/Chinese-Fighter-Buzzes-US-Patrol-Aircraft>>.

²¹⁸ Quoted in *ibid*.

Ministry spokesman Colonel Yang Yujun countered this accusation by stating that “the operation by the Chinese pilot was professional and maintained a safe distance with the U.S. plane.”²¹⁹ It is unclear which State has the stronger argument due to a lack of evidence and impartial observers. However, what is clear is that close interceptions such as this one will continue to occur as long as China and the U.S. advance divergent interpretations of international law – interpretations which accord with their own strategic interests.

On 20 May 2015, another U.S. Navy P-8A Poseidon maritime patrol aircraft conducted a flight over the artificial island built by China on Fiery Cross Reef in the Spratlys. The Chinese navy issued eight warnings to the U.S. aircraft, requesting it to leave in order to avoid misunderstanding.²²⁰ On 27 October 2015, a U.S. guided-missile destroyer, the USS *Lassen*, conducted a patrol within 12 nautical miles of the artificial island built by China on Subi Reef in the Spratly Islands under a freedom of navigation exercise. However, Chinese foreign ministry spokesman Lu Kang said that the U.S. ship had “illegally entered” the waters near the islands “without receiving permission from the Chinese government.”²²¹ China did not clarify what it meant by “waters near the islands”; however, it is worth noting that in its final award issued on 12 July 2016, the arbitral tribunal ruled that Subi Reef is a low-tide elevation.²²² Accordingly, this reef cannot generate a territorial sea.

²¹⁹ Quoted in Charles Hutzler, *Beijing Denies Fighter Flew Dangerously Close to U.S. Patrol Plane* (23 August 2014) The Wall Street Journal <<http://www.wsj.com/articles/china-denies-fighter-flew-dangerously-close-to-u-s-patrol-plane-1408810331>>.

²²⁰ *US to press on with surveillance flights amid tensions in the South China Sea* (22 May 2015) South China Morning Post <<http://www.scmp.com/news/china/diplomacy-defence/article/1806818/us-pledges-press-surveillance-flights-amid-tensions>>.

²²¹ Quoted in *South China Sea: China slams US over warship sailing near artificial islands; US ambassador 'summoned'* (28 October 2015) ABC News <<http://www.abc.net.au/news/2015-10-28/china-summons-us-ambassador-over-south-china-sea-patrol/6890786>>.

²²² *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [368].

Taking into account all the incidents discussed above, it is clear that China's sovereign immune vessels and aircraft, in an effort to bolster China's maritime claims in the South China Sea, have operated both dangerously and in a manner inconsistent with international safety standards, causing serious risk of damage and injury to vessels, aircraft and crew of other States. Unfortunately, there are no signs indicating that China will compromise its maritime claims in the region, or that it will respect any international legal process regarding such claims or the operations of its sovereign immune vessels and aircraft.

The table below lists all well-known incidents involving sovereign immune vessels and aircraft in the South China Sea. Incidents are differentiated by the root causes in order to provide a clear picture of the existing challenges for the navigation and overflight of these types of vessels and aircraft in this region.

Table 7.1 Maritime incidents involving South China Sea littoral States

Incident/Date	Root Cause
U.S. Navy EP-3 (2001)	Different perspectives over foreign military activities in the EEZ.
USS <i>Impeccable</i> (3/2009)	Different perspectives over foreign military activities in the EEZ.
USS <i>John McCain</i> (6/2009)	It is believed that this incident was unintentional.
Indonesia-China standoff (6/2010)	China claims its fishing vessels were operating legally in what it considers "traditional Chinese fishing grounds." However, the fishing vessels were fishing in the EEZ claimed by Indonesia. Therefore, this incident could be classified as a dispute over jurisdiction/access to resources.
<i>Binh Minh 02</i> (5/2011)	Incident occurred in the EEZ claimed by Vietnam, but also within the nine-dash line claimed by China. Thus, it could be classified as a dispute over jurisdiction/access to resources.

Incident/Date	Root Cause
Scarborough Shoal standoff (4-6/2012)	Sovereignty dispute over the Scarborough Shoal.
Indonesia-China standoff (3/2013)	China claims its fishing vessels were operating legally in what it considers “traditional Chinese fishing grounds.” However, the fishing vessel was fishing in the EEZ claimed by Indonesia. Accordingly, it could be classified as a dispute over jurisdiction/access to resources.
USS <i>Cowpens</i> (12/2013)	Dispute over military activities in the EEZ.
China-Philippines standoff (1/2014)	Dispute over jurisdiction and access to resources.
<i>Haiyang Shiyou-981</i> oil rig incident (5-7/2014)	Disputes concerning sovereignty claims over the Paracel Islands, and also over maritime boundaries and access to resources.
U.S. Navy P-8 (8/2014)	Dispute over military activities in the EEZ.
U.S. Navy P-8A (5/2015)	Disputes over freedom of navigation and overflight rights, and over maritime zones supposedly generated from artificial islands.
USS <i>Lassen</i> (10/2015)	Dispute over freedom of navigation and overflight rights, and over maritime zones supposedly generated from artificial islands.
Indonesia-China Standoff (3/2016)	China claims its fishing vessels were operating legally in what it considers “traditional Chinese fishing grounds.” However, the fishing vessel was fishing in the EEZ claimed by Indonesia. Therefore, it could be classified as a dispute over jurisdiction/access to resources.

7.5 Conclusion

The rules and principles governing the operation of sovereign immune vessels and aircraft at sea are chiefly found in the LOSC, COLREGs and the Chicago Convention.

However, gaps still exist in the regulatory framework, coupled with ambiguities in existing international law provisions. Indeed, these ambiguities have created room for States to adopt conflicting interpretations of pertinent provisions – interpretations which advance the strategic and national interests of individual States. As sovereign immune vessels and aircraft are used to protect State interests, intentional and unintentional incidents between these vessels and aircraft are difficult to avoid, especially in the South China Sea where the geostrategic situation is quite complex.

By analysing the selected incidents in this chapter, it is clear that: (i) it will be difficult for States in the region to reach a uniform interpretation of international law provisions regarding the navigation and overflight of sovereign immune vessels and aircraft at sea; (ii) legal loopholes exist at the international level regarding the interaction between sovereign immune aircraft in international airspace; (iii) China will continue making maritime claims in the South China Sea based on a nationalistic view of “historic rights.” China will also keep interpreting international law provisions narrowly (or completely disregarding them) to suit its own interests and with no regard for formal legal processes; (iv) China’s pattern of aggressive behaviour in the South China Sea will likely escalate, resulting in more maritime incidents, both intentional and unintentional. These incidents will be difficult to avoid, leading to further tension in the region; and (v) navigation and overflight in the South China Sea by sovereign immune vessels and aircraft will continue to be a contentious issue in the future.

It is important to highlight that, by virtue of concerted diplomatic efforts, none of these incidents escalated into a major conflict. However, the incidents have added to the strategic mistrust between the States concerned. In order to avoid similar incidents from occurring in the future, States in the region should respect internationally accepted legal instruments, strive to cooperate with each other (particularly with regard to existing

international law gaps), enhance maritime confidence building measures, as well as build better communication channels for the promotion of maritime safety and security for the region as a whole. The next chapter addresses regional efforts to build confidence and navigational safety.

8 REGIONAL EFFORTS TO ADDRESS THE PASSAGE OF SOVEREIGN IMMUNE VESSELS AND AIRCRAFT

8.1 Introduction

In order to fill the gaps in international law and policy regarding the passage of sovereign immune vessels and aircraft at sea, a number of regional initiatives have been developed for the South China Sea region. These include: (i) conflict management mechanisms initiated by regional institutions, including the 2002 ASEAN Declaration on Conduct of Parties in the South China Sea (DOC); (ii) the Code for Unplanned Encounters at Sea (CUES) adopted at the Western Pacific Naval Symposium in 2014; (iii) existing bilateral maritime cooperation and confidence building measures involving South China Sea littoral States; (iv) Track II level regional workshops (notably the EEZ Group 21 sponsored by the Ocean Policy Research Foundation); and (v) the unilateral policies of individual maritime States which seek to preserve the navigational rights of vessels and aircraft, particularly the U.S. Freedom of Navigation Program. This chapter will critically analyse and evaluate these existing regional efforts.

8.2 Regional efforts to develop guidelines for the passage of sovereign immune vessels and aircraft

8.2.1 ASEAN and the Declaration on Conduct of Parties in the South China Sea (DOC)

8.2.1.1 Background to the DOC

One of ASEAN's chief objectives of is to “promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter.”¹ Five of the ten member States of ASEAN are actively involved in South China Sea

¹ *Overview* (13 March 2015) Association of Southeast Asian Nations <<http://www.asean.org/asean/about-asean/overview>>.

disputes, namely Vietnam, the Philippines, Malaysia, Brunei and Indonesia. The inclusion of Indonesia is due to its involvement in overlapping maritime jurisdictional claims with China's "nine-dash line." The first ASEAN statement on the South China Sea was in the ASEAN Declaration on the South China Sea signed in Manila 22 July 1992. This Declaration emphasised "the necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force."² The Declaration urged "all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes."³ In March 1995, and in response to the Mischief Reef incident⁴, ASEAN Foreign Ministers issued their second statement, expressing their "serious concern" and "call[ing] upon all parties to refrain from taking actions that destabilize the region and further threaten the peace and security of the South China Sea."⁵ In 1995, at the second ASEAN Regional Forum held in Brunei, the Philippines proposed the adoption of a Code of Conduct for the South China Sea that would, in the words of Carlyle Thayer, "constrain China from further encroachment."⁶ The idea of concluding a regional code of conduct which would "lay the foundation for long term stability in the area and foster understanding among claimant countries," was endorsed by ASEAN foreign ministers at the 29th ASEAN Ministerial Meeting held in Jakarta in July 1996.⁷ In 1999 ASEAN member States

² *1992 ASEAN Declaration on the South China Sea* (22 July 1992) Association of Southeast Asian Nations <<http://www.asean.org/1196.htm>>

³ Ibid.

⁴ Mischief Reef is part of the Spratly Islands and located in the Philippines' claimed EEZ. On 8 February 1995, the Philippines discovered that China had built structures on the reef. The Philippines made a protest against China's actions; however, the Chinese government rejected the protest and said that the structures constituted shelter for fishermen.

⁵ *Statement by the ASEAN Foreign Ministers on the Recent Developments in the South China Sea* (18 March 1995) Association of Southeast Asian Nations <<http://www.asensec.org/2089.htm>>.

⁶ Carlyle A Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea' (2013) 33(2) *SAIS Review of International Affairs* 75, 76.

⁷ *Joint Communique of The 29th ASEAN Ministerial Meeting (AMM)* (21 July 1996) Association of Southeast Asian Nations <<http://www.asean.org/communities/asean-political-security->

agreed on a draft Code of Conduct, and by that time China had prepared its own draft Code of Conduct.⁸ In 2000 ASEAN member countries and China exchanged their respective drafts in order to reach a final agreement on a regional Code of Conduct (COC).⁹ However, an agreement could not be reached due to four major areas of difference: the geographic scope of the COC, issues relating to construction on occupied and unoccupied features, military activities in disputed waters, and the treatment of fishermen in disputed waters.¹⁰ On 4 November 2002, and after several years of negotiations, China and ASEAN member States agreed, as a compromise, to sign a non-binding political statement known as the Declaration on Conduct of Parties in the South China Sea (DOC). The objective of the document was “to enhance favorable conditions for a peaceful and durable solution of differences and disputes among countries concerned.”¹¹ This declaration contained four measures to build trust and confidence between the parties, as well as five areas of cooperative engagement.¹² Regarding navigational issues, all parties “reaffirm[ed] their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”¹³. The spirit of the DOC encourages all parties to undertake cooperative activities regarding the safety of navigation and communication

community/item/joint-communique-of-the-29th-asean-ministerial-meeting-amm-jakarta-20-21-july-1996>.

⁸ Thayer, above n 6, 76.

⁹ Ibid.

¹⁰ Ibid 77; Yann Huei Song, 'The Declaration on the Conduct of Parties and a Code of Conduct in the South China Sea: Recent Actions Taken by ASEAN' in Seokwoo Lee and Hee Eun Lee (eds), *Northeast Asian Perspectives on International Law: Contemporary Issues and Challenges* (Martinus Nijhoff, 2013) 41.

¹¹ See *Declaration on the Conduct of Parties in the South China Sea* (4 November 2002) Association of Southeast Asian Nations, <<http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>>.

¹² Ibid; Thayer, above n 6, 77.

¹³ *Declaration on the Conduct of Parties in the South China Sea*, above n 11, point 3.

at sea.¹⁴ Most importantly, all parties reaffirmed their intention to work towards the adoption of a legally binding Code of Conduct in the South China Sea on the basis of consensus.¹⁵

The DOC was perceived by China and ASEAN “as a milestone document which embodies the collective commitment of ASEAN member States and China to promote peace, stability and mutual trust in the South China Sea.”¹⁶ However, it was not until nine years later, in July 2011, that ASEAN and China reached an agreement on guidelines for the implementation of the DOC.¹⁷ It is important to note, however, that these guidelines do not contain provisions on the conduct of vessels or aircraft towards one another, or any guidance on communication channels for contending vessels and aircraft in the event of such contact.¹⁸ In January 2012 ASEAN and China agreed to establish four expert committees for the implementation of the guidelines. These expert committees span the areas of maritime scientific research, environmental protection, search and rescue, as well as transnational crime. However, no expert committee was charged with the responsibility for the safety of navigation and communication at sea.¹⁹ And although discussions between the parties have continued, no projects have thus far been implemented. In 2012, ASEAN drafted its own draft Code of Conduct, known as ASEAN Proposed Elements of a Regional Code of Conduct. Indonesia then proposed a

¹⁴ Ibid point 6(c).

¹⁵ Ibid point 10.

¹⁶ *Joint Statement of the 15th ASEAN-China Summit on the 10th Anniversary of the Declaration on the Conduct of Parties in the South China Sea* (19 November 2012) The Association of Southeast Asian Nations <<http://www.asean.org/news/item/twentyfirst-asean-summit-phnom-penh-cambodia-18-november-2012>>.

¹⁷ *Guidelines for the Implementation of the DOC* (July 2011)

<<http://myoceanic.files.wordpress.com/2013/07/guidelines-on-the-implementation-of-the-doc1.pdf>>.

¹⁸ See Sheldon W Simon, 'Conflict and Diplomacy in the South China Sea: The View from Washington' (2012) 52(2) *Asian Survey* 995, 1005; *Guidelines for the Implementation of the DOC 2011* (27 July 2012) BienDong.net <<http://www.southchinasea.com/documents/law/306-guidelines-for-the-implementation-of-the-doc.html>>.

¹⁹ Thayer, above n 6, 77.

“Zero Draft” Code of Conduct for the South China Sea on the sidelines of the UN General Assembly session in September 2012. Importantly, this version contained “additional elements to make it more prescriptive and operational.”²⁰ For Carlyle Thayer, the most significant contribution of this “Zero Draft” Code of Conduct is that it contains “suggested rules, norms and procedures for carrying out confidence building measures” and “detailed provisions for preventing incidents and collisions at sea.”²¹ However, according to Mark Valencia, the “Zero Draft” contains “bold language” that makes it unlikely to be agreed upon by ASEAN members and China.²² For instance, it contains provisions which require contracting parties to refrain from:

[c]onducting military exercise, military surveillance, or other provocative actions in the South China Sea; occupying or erecting new structures on the islands, and land features presently occupied or not; inhabiting the presently uninhabited islands and other land features; and conducting activities that threaten navigational safety and/or polluting the environment.²³

Given that China is currently engaged in an extensive artificial island building program in the Spratlys, it is unlikely that China would readily accept provisions that prohibit parties from occupying and inhabiting islands and land features. Regarding military exercises and military surveillance, while China and two other ASEAN States (namely Malaysia and Thailand), have restrictive views on foreign military activities in the EEZ, other ASEAN States have not officially expressed their views on this issue. Even if China and ASEAN members were to agree with the proposed provisions in the

²⁰ Ibid, 79; see also Mark J Valencia, 'What the 'Zero Draft' Code of Conduct for the South China Sea Says (and Doesn't Say)' (2013) 8(1) *Global Asia* 73, 73-74; Carlyle A Thayer, 'ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?' (2012) 10(34) *Asia-Pacific Journal* 1, 2.

²¹ Thayer, above n 6, 79.

²² Valencia, above n 20, 75.

²³ Quoted in ibid 79.

Indonesian “Zero Draft” it is unlikely that other maritime States, particularly the United States, would accept the provisions. It is also arguable that the provisions of the “Zero Draft,” which seek to restrict military activities in the South China Sea are contrary to the LOSC. As the security and stability of the South China Sea is a priority for many States, not only for littoral States, a Code of Conduct for the region should be set out in such a way as to encourage outside maritime powers to accede to it, or at the very least, respect it.

While ASEAN wishes to expedite the conclusion of a Code of Conduct, China, on the other hand, wants to see the implementation of the DOC first, viewing a Code of Conduct for the South China Sea as a long term objective.²⁴ In 2013, during his visit to ASEAN States, Chinese Foreign Minister Wang Yi stated that all parties should have “realistic expectations” and should take “a gradual approach” to a proposed Code.²⁵ In August 2016, China and the ASEAN agreed to reach a framework for a code of conduct for the South China Sea by the middle of 2017.²⁶

8.2.1.2 The limitations of the DOC

After signing the DOC, China’s Vice Foreign Minister Wang Yi stated that the DOC would “send a clear signal to the outside that countries in the region can fully handle differences between each other through dialogue and jointly maintain peace and

²⁴ Ralf Emmers, 'ASEAN's Search for Neutrality in the South China Sea' (2014) 2(1) *Asian Journal of Peacebuilding* 61, 73.

²⁵ Joanna Chiu, *Beijing tells Asean to be realistic in hopes for South China Sea code of conduct* (6 August 2013) South China Morning Post <<http://www.scmp.com/news/china/article/1294453/foreign-minister-wang-yi-says-china-no-hurry-sign-south-china-sea-accord>>.

²⁶ Blanchard, Ben and Clarence Fernandez, *China, ASEAN aim to complete framework of South China Sea rules next year* (17 August 2016) Reuters <<http://www.reuters.com/article/us-southchinasea-china-idUSKCN10S0DQ>>

stability in the South China Sea region through cooperation.”²⁷ Some Chinese scholars have expressed the optimistic view that “from now on, ASEAN and China are joining hands together to establish common security and to gain common prosperity.”²⁸ However, other commentators have opined that as the DOC is only a political statement, not a legally binding document, it is unrealistic to expect it to prevent parties from undertaking activities that complicate the situation.²⁹ In fact, tensions have continued to rise in the South China Sea following the signing of the DOC, with the parties involved continuing to accuse one another of violating the DOC. There have also been several incidents involving sovereign immune vessels and aircraft in the South China Sea which have violated the spirit of the DOC which are noted below. On 2 March 2011, two Chinese patrol vessels aggressively harassed the MV *Veritas Voyager*, a seismic survey ship chartered by Forum Energy, a UK-based oil and gas company. The Philippine government had awarded Forum Energy a contract to conduct the seismic survey in the Reed Bank area.³⁰ The incident occurred approximately 80 nautical miles from Palawan Island, within the Philippine claimed EEZ.³¹ The May 2011 Chinese harassment of a Vietnamese seismic survey vessel, including intentionally cutting a cable towing

²⁷ Vice Foreign Minister Wang Yi on the Achievements of Premier Zhu Rongji's Visit (16 August 2004) Embassy of People's Republic of China in the Republic of Zimbabwe <<http://www.chinaembassy.org.zw/eng/xwdt/t149206.htm>>.

²⁸ Wu Shicun and Ren Huaifeng, 'More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea' (2003) 2(1) *Chinese Journal of International Law* 311, 319.

²⁹ Nguyen Hong Thao, 'The Declaration on the Conduct of Parties in the South China Sea: A Vietnamese Perspective 2002-2007' in Sam Bateman and Ralf Emmers (eds), *Security and International Politics in the South China Sea* (Routledge, 2009) 211; Tran Thuy Truong, *Recent Developments in the South China Sea: Implications for Regional Security and Cooperation* (30 June 2011) Center for Strategic and International Studies <<http://csis.org/publication/recent-developments-south-china-sea-implications-regional-security-and-cooperation>>.

³⁰ Ian Storey, 'China and the Philippines: Implications of the Reed Bank Incident' (2011) 11(8) *ChinaBrief* 6, 7; Carlyle A Thayer, 'China-ASEAN and the South China Sea: Chinese Assertiveness and Southeast Asian Responses' (Paper presented at the International Conference on Major Policy Issues in the South China Sea: European and American Perspectives, Taipei, Taiwan, 6-9 October 2011), 4.

³¹ Storey, above n 30, 7; Truong, above n 29, 20.

seismic equipment,³² led to Vietnam lodging a formal diplomatic protest, claiming that China's actions violated international law and the spirit of the DOC.³³ Following the 2012 standoff between China and the Philippines over the Scarborough Shoal,³⁴ and the subsequent January 2013 Philippines submission of a Notification and Statement of Claim (Notification) against China before the Arbitral Tribunal established under Annex VII of the LOSC.³⁵ China rejected the Notification on the ground that "the note and related notice not only violate the consensus enshrined in the Declaration on the Conduct of Parties in the South China Sea (DOC), but are also factually flawed and contain false accusations."³⁶ In its Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, China claimed that the Philippines had agreed, through the DOC, to settle their disputes through negotiation. Therefore, according to China, the decision of the Philippines to unilaterally initiate arbitration proceedings had violated international law.³⁷ And the 75 day standoff on the *Haiyang Shiyou 981* oil rig in May 2014,³⁸ Vietnam accused China of "seriously infring[ing]...Vietnam's sovereignty, sovereign rights and jurisdiction as

³² Carlyle A Thayer, 'Navigating the currents of legal regimes and realpolitik in East Asia's maritime domain' in Wu Shicun and Zou Keyuan (eds), *Securing the Safety of Navigation in East Asia: Legal and Political Dimensions* (Chandos Publishing, 2013) , 32; *Tàu Trung Quốc ngang ngược xâm phạm vùng đặc quyền kinh tế Việt Nam* (27 May 2011) VNExpress (in Vietnamese) <<http://vnexpress.net/tin-tuc/thoi-su/tau-trung-quoc-ngang-nguoc-xam-pham-vung-dac-quyen-kinh-te-viet-nam-2196171.html>>.

³³ *VN condemns Chinese intrusion* (28 May 2011) Vietnamnet <<http://english.vietnamnet.vn/fms/government/8551/vn-condemns-chinese-intrusion.html>>.

³⁴ M. Taylor Fravel, *China's Island Strategy: "Redefine the Status Quo."* (1 November 2012) The Diplomat <<http://thediplomat.com/2012/11/chinas-island-strategy-redefine-the-status-quo/>>.

³⁵ See Department of Foreign Affairs, Republic of the Philippines, *Notification and Statement of Claim*, Manila 22 January 2013.

³⁶ Quoted in *China rejects Philippines' arbitral request: FM* (19 February 2013) Xinhua.net <http://news.xinhuanet.com/english/china/2013-02/19/c_132178817.htm>.

³⁷ See *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (12 July 2014) Ministry of Foreign Affairs of the People's Republic of China <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

³⁸ *Chinese aircraft intimidate Vietnam's law enforcement vessels* (21 June 2014) Vietnamnet <<http://english.vietnamnet.vn/fms/government/105605/chinese-aircraft-intimidate-vietnam-s-law-enforcement-vessels.html>>.

enshrined under the United Nations Convention on the Law of the Sea of 1982, and violat[ing] the Declaration on the Conduct of Parties in the South China Sea of 2002.”³⁹

The DOC urges all parties to “refrain from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.”⁴⁰ However, since 2013, China has been constructing artificial islands on a number of submerged features in the Spratlys and ignoring protests from other ASEAN States.⁴¹ While other claimants of the Spratlys have erected structures on existing land features, “China is changing the size, structure and physical attributes of land features themselves.”⁴² At the 14th Shangri-La Dialogue held in Singapore in May 2015, U.S. Defense Secretary Ashton Carter expressed serious concern over China’s massive “land reclamations” in the Spratly islands, adding that “China has reclaimed over 2,000 acres, more than all other claimants combined – and more than in the entire history of the region. And China did so in only the last 18 months. It is unclear how much farther China will go.”⁴³ Carter further asserted that “with its actions in the South China Sea, China is out of step with both the international rules and norms.”⁴⁴ Greg Poling, an analyst from the Center for Strategic and International Studies, has also expressed the view that China’s action “certainly violates

³⁹ Annex to the letter dated 7 May 2014 from the Permanent Representative of Vietnam to the United Nations addressed to the Secretary-General (A/68/870).

⁴⁰ *Declaration on the Conduct of Parties in the South China Sea*, above n 11, point 5.

⁴¹ See Greg Torode, *China to project power from artificial islands in South China Sea* (19 February 2015) Reuters <<http://www.reuters.com/article/2015/02/19/us-southchinasea-reefs-china-idUSKBN0LN0J820150219>>.

⁴² See *Senators McCain, Reed, Corker, and Menendez Send Letter on Chinese Maritime Strategy* (19 March 2015) United States Senate Committee on Armed Services <<http://www.armed-services.senate.gov/press-releases/senators-mccain-reed-corker-and-menendez-send-letter-on-chinese-maritime-strategy>>.

⁴³ Quoted in Graeme Dobell, *The US and China: cause, effect and uncertainty* (1 June 2015) Australian Strategic Policy Institute <<http://www.aspistrategist.org.au/the-us-and-china-cause-effect-and-uncertainty/>>.

⁴⁴ Quoted in *US calls for China to stop sea reclamations* (30 May 2015) Sky News <<http://www.skynews.com.au/news/world/asiapacific/2015/05/30/us-calls-for-china-to-stop-sea-reclamations.html>>.

the spirit of the 2002 Declaration of Conduct (DOC) between China and ASEAN, and is at best on shaky legal grounds.”⁴⁵ When asked about China's maritime moves in the South China Sea, Philippine President Benigno Aquino even made a veiled comparison between China's activities in the region and Nazi Germany's expansionism before World War II.⁴⁶

It is clear that the DOC has been referred to by China and ASEAN States in their statements regarding disputes and incidents in the South China Sea. However, its major limitation of the DOC is that it is only a political statement with no legally binding force. Indeed, concerned States in the region refer to the DOC as an important agreement for conflict management in the South China Sea only because there is no other viable alternative. Another major limitation is that it does not set out its geographic scope, as those States which are party to it could not agree on which areas were under dispute or indisputable. As a result, DOC signatory States can argue that their actions are conducted in their own undisputed waters. Taking into account the existing sovereignty disputes over offshore features in the South China Sea, China's infamous and ambiguous nine-dash line claim as well as its rejection to the arbitral tribunal ruling, it is highly unlikely that China and ASEAN will reach an agreement on the identification of disputed areas in this maritime region in the near future.

Regarding the safety of maritime navigation and communication, neither the DOC nor its Implementation Guidelines address the conduct of sovereign immune vessels and aircraft of signatory States when they encounter each another at sea. Furthermore, there exists no joint understanding or joint interpretation of the provisions

⁴⁵Quoted in Luke Hunt, *China Challenges ASEAN with Land Fills in South China Sea* (10 March 2015) The Diplomat <<http://thediplomat.com/2015/03/china-challenges-asean-with-land-fills-in-south-china-sea/>>.

⁴⁶ Yuya Shino, *Philippine's Aquino revives comparison between China and Nazi Germany* (3 June 2015) Reuters <<http://www.reuters.com/article/2015/06/03/us-japan-philippines-idUSKBN0OJ0OY20150603>>.

of the LOSC regarding navigation issues in various maritime jurisdictional zones between China and ASEAN, either in the DOC or elsewhere.

As the above discussion has highlighted, disputes over sovereignty and maritime boundaries in the region remain unresolved. China claims almost all of the South China Sea and appears to be more aggressively asserting its claims while ignoring the tribunal's ruling against it. The above-mentioned incidents would seem to indicate that the hostile behaviour of Chinese vessels and aircraft in the South China Sea will continue. Therefore, the need for binding "rules of the road" and "rules of the air" in a COC between China and ASEAN members has never been more pressing. As previously indicated, although China and ASEAN intend on keeping the DOC on foot, it is unlikely there will be a legally binding Code of Conduct for the South China Sea in the near future. Moreover, Taiwan is a party to the South China Sea dispute, but it is neither a member of the DOC nor any official regional agreement. Therefore, any disputes in the South China Sea involving Taiwan could pose a real challenge. Indeed, the three-hour-standoff between a Philippines Coast Guard vessel and a Taiwanese Coast Guard vessel in the South China Sea on 25 May 2015 illustrates this point.⁴⁷ The confrontation was the result of different views on the scope of maritime patrols in the overlapping EEZs of the Philippines and Taiwan. Hence, the need to include Taiwan in regional initiatives regarding navigation and overflight in the South China Sea is a considerable unresolved issue.

⁴⁷ See Joseph Yeh, *Fishing incident due to differing legal opinions: foreign minister* (27 May 2015) China Post <<http://www.chinapost.com.tw/taiwan/foreign-affairs/2015/05/27/437000/Fishing-incident.htm>>.

8.2.2 Western Pacific Naval Symposium and the Code for Unplanned Encounters at Sea

8.2.2.1 The development of the Code

In addition to ASEAN, the Western Pacific Naval Symposium (WPNS) has developed a Code for Unplanned Encounters at Sea (CUES). The WPNS is a series of biennial meetings where leaders of regional navies whose countries border the Pacific Ocean region to discuss naval matters. Currently the WPNS consists of 21 members, among others, including China, the United States, India, Japan, Australia and eight ASEAN States (Brunei, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam). In 1999, the Chief of the Royal Australian Navy initially promulgated a Code for Unalerted Encounters at Sea (CUES). The Code was based on international legal and navigation principles and sought to promote the safe conduct of navy ships and aircraft when they encounter each other at sea. The first draft of the Code was released in 1999, but it has gone through various revisions since that time. The purpose of the Code is to offer “a means by which navies may safeguard and advance their rights, duties, freedoms and responsibilities, develop mutually rewarding international cooperation and transparency and provide leadership and broad-based involvement in establishing international standards in relation to the use of the sea.”⁴⁸ In 2003 the Code was again reviewed and supplemented with “safety measures and a means to limit mutual interference and uncertainty and facilitate communication when naval and public ships, submarines or aircraft make contact.”⁴⁹ At the WPNS held in Malaysia in 2012, China was the only State that rejected the updated Code for Unalerted Encounters at Sea (CUES 2003). According to Vice Admiral Ding – deputy commander

⁴⁸ 'Code for unalerted encounters at sea' (2012) 4(4) *Australian Journal of Maritime and Oceans Affairs* 126.

⁴⁹ *Ibid*, 126.

of the People's Liberation Army Navy (PLA Navy), China felt that certain parts of the document needed to be further discussed, and that the word "code" implied a legally binding agreement.⁵⁰ Vice Admiral Ding also added that "the CUES is not applicable to the PLA Navy as the document is in English."⁵¹ At the Western Pacific Naval Symposium Workshop held in Bangkok in 2013, China took issue with many of the provisions of CUES 2003. China argued that the territorial sea should be deleted from the applicable scope of the Code, as foreign warships entering China's territorial sea need to seek prior authorisation from China's Government (and therefore there would be no unalerted encounters between Chinese and foreign warships).⁵² China also argued that the WPNS "is not authorized to formulate a Code for Un-alerted Encounters at Sea for public vessels and state aircraft."⁵³ Therefore, it recommended that a Code for Unalerted Encounters at Sea should only apply to naval warships and naval aircraft.⁵⁴ Following the WPNS, CUES 2003 underwent a further review and was circulated to all WPNS members in late 2013, with the document finally being adopted at the WPNS held in China in April 2014.

The name of the adopted Code was changed from Code for Unalerted Encounters at Sea to Code for Unplanned Encounters at Sea (CUES 2014).⁵⁵ Like CUES 2003, CUES 2014 uses definitions which, where applicable, correlate with those found in the International Regulations for Preventing Collisions at Sea (COLREGs) and under international law generally.⁵⁶ CUES 2003 defines an "Encounter at Sea" as:

⁵⁰ See *Minutes*, 13th Western Pacific Naval Symposium (25-26 September 2012), 7-8.

⁵¹ *Ibid.*

⁵² *Minutes*, 13th Western Pacific Naval Symposium (21-23 May 2013), 4.

⁵³ *Ibid.* 5.

⁵⁴ *Ibid.*

⁵⁵ See Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014.

⁵⁶ *Ibid.* point 1.3

An encounter...when warships, submarines, public vessels or naval aircraft of one State meet casually or unexpectedly with warships, submarines, public vessels or naval aircraft of another State on the high seas, territorial waters, contiguous zones, exclusive economic zone, and archipelagic waters of an archipelagic state.⁵⁷

CUES 2014 defines “Unplanned Encounters at Sea” as “naval ships or naval aircraft of one State meet[ing] casually or unexpectedly with a naval ship or naval aircraft of another State.”⁵⁸ According to CUES 2014, a naval ship is “a descriptor that is assumed to include warships, naval auxiliaries, and submarines”, while a naval aircraft “is to include helicopters, fixed wing aircraft and unmanned aerial systems or vehicles.”⁵⁹ The objective of CUES 2014 is to offer “safety procedures, a basic communications plan and basic manoeuvring instructions for naval ships and naval aircraft during unplanned encounters at sea.”⁶⁰ This means that many vessels and aircraft, including coast guard patrol vessels, marine surveillance ships and aircraft, as well as vessels belonging to fisheries agencies, are excluded from CUES 2014. Whereas CUES 2003 was expressed as applying on the high seas, territorial waters, contiguous zones, exclusive economic zones, and in the archipelagic waters of archipelagic states, CUES 2014 does not specify the maritime zones in which it operates. Even so, it is noteworthy that CUES 2014 uses definitions found in COLREGs. The term “at sea” (as used in COLREGs) indicates the high seas and “all waters connected therewith navigable by seagoing vessels.”⁶¹ Even though COLREGs entered into force before the LOSC, it is clear that all navigable waters connected to the high seas (as expressed in

⁵⁷ Western Pacific Naval Symposium, *Code for Unalerted Encounters at Sea* (Review Supplement June 2003), point 1.3.

⁵⁸ Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014, point 1.3.

⁵⁹ Ibid.

⁶⁰ Ibid point 1.2.

⁶¹ COLREGS, rule 1(a).

COLREGs) include the EEZ.⁶² Therefore, it is possible that CUES 2014 only applies on the high seas and in EEZs.⁶³ CUES 2003 contains one article which provides standard safety procedures for ships engaged in surveillance. The article states that:

Ships engaged in surveillance should remain clear of platforms under surveillance so as to avoid the risk of collision. They should also employ the practice of good seamanship so as to avoid carrying out any manoeuvres that could endanger the object of surveillance or cause it to deviate from intended course and/or speed.⁶⁴

This article is similar to those contained in a number of incidents at sea agreements, such as those between the United States and the former Soviet Union⁶⁵, Russia and the Republic of Korea⁶⁶, and between Malaysia and Indonesia⁶⁷. At the 2013 WPNS Workshop held in Bangkok, China did not agree with this article and proposed an amended version in the following form:

Ships engaged in surveillance and those of surveillance should mutually employ the practice of good seamanship so as to avoid carrying out any manoeuvres that could endanger the navigation safety and the risk of collision.⁶⁸

Due to disagreement between the parties, the article regarding surveillance activities was deleted from CUES 2014. As many incidents at sea (and particularly

⁶² Jonathan G. Odom, 'The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (outside of China) Should be Concerned.' (2010) 18(3) *Michigan State Journal of International Law* 1, 18.

⁶³ See Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress' (Congressional Research Service, 5 August 2014), 9; see also Christian Le Mièrre, *Managing unplanned encounters at sea* (1 May 2014) IISS <<http://www.iiss.org/en/militarybalanceblog/blogsections/2014-3bea/april-7347/managing-unplanned-encounters-at-sea-087b>>.

⁶⁴ Western Pacific Naval Symposium, *Code for Unalerted Encounters at Sea* (Review Supplement June 2003).

⁶⁵ *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972).

⁶⁶ *Agreement between the Government of the Republic of Korea and the Government of the Russian Federation Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea*, signed 2 June 1994 (entered into force 2 July 1994).

⁶⁷ MALINDO Prevention of Sea Incident Cooperative Guidelines (Jakarta 18 January 2001)

⁶⁸ *Minutes*, 13th Western Pacific Naval Symposium (21-23 May 2013), 5.

those in the South China Sea), involve surveillance activities of naval vessels and aircraft, the omission of this article has created a significant loophole in CUES 2014.

The adoption of CUES 2014 was described by Admiral Wu Shengli, the head of the Chinese navy, as a milestone document that is “highly significant to navies in the region in promoting communication and reducing misjudgment and misunderstanding.”⁶⁹ The U.S. Chief of Naval Operations, Admiral Jonathan Greenert, also emphasised the significance of CUES 2014, stating that: “We’ve agreed to increase the standards that we will set at sea. We’ve agreed to establish proficiency in communications. We’ve agreed to establish common behaviour at sea. We’ve agreed to prevent misunderstanding and miscalculations.”⁷⁰ However, CUES 2014 appears to suffer from a number of limitations in preventing tense encounters, particularly in the South China Sea. As Christian Le Mièrè has opined, “it is, in truth, very weak.”⁷¹ These limitations will now be explored in greater detail.

8.2.2.2 The limitations of CUES 2014

Firstly, CUES 2014 is a document which WPNS navies choose to adopt on a voluntary and non-binding basis. Accordingly, there is no arbitration mechanism in the agreement for disputes arising from incidents between naval ships or naval aircraft.⁷² Indeed, a U.S. Navy Pacific Fleet official has postulated that CUES 2014 is unlikely to curb the risk of vessels colliding at sea.⁷³ He added that: “[I]f your intent is to cause

⁶⁹ Pan Xiaoqiao, *Maritime Security Cooperation: The Code of Unplanned Encounters at Sea agreement reached at the PLA-Navy-hosted regional symposium* (5 July 2014) Beijing Review <http://www.bjreview.com.cn/quotes/txt/2014-07/05/content_627875_2.htm>.

⁷⁰ Quoted in *Navy Leaders Agree to CUES at 14th WPNS* (23 April 2013) America's Navy <http://www.navy.mil/submit/display.asp?story_id=80532>.

⁷¹ Mièrè, above n 63.

⁷² Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014, point 1.6.

⁷³ Megha Rajagopalan, *Pacific accord on maritime code could help prevent conflicts* (22 April 2014) Reuters <<http://www.reuters.com/article/2014/04/22/us-china-military-idUSBREA3L0NC20140422>>.

trouble, you're going to cause trouble no matter what.”⁷⁴ Moreover, CUES 2014 focuses mainly on safety procedures of naval ships rather than naval aircraft. As noted in Chapter Seven, on 19 August 2014, four months after CUES 2014 was approved, a Chinese fighter jet, the *Shenyang J-11B*, intercepted a U.S. Navy P-8 marine patrol and surveillance aircraft in international airspace in a dangerous manoeuvre⁷⁵ However, CUES 2014 was not invoked by either party in relation to this incident.

Secondly, CUES 2014 only applies to naval vessels and naval aircraft. However, as discussed in Chapter Seven, the majority of incidents in the South China Sea have involved non-naval maritime law enforcement vessels. In addition, China has the largest coast guard fleet in the world, and has been using its fishing vessels as government proxies and maritime militia to strengthen its maritime claims. As CUES 2014 does not cover civilian vessels, foreign naval vessels cannot expect civilian ships to abide by the agreement. Indeed, with the increasing role of maritime law enforcement agencies in the region, a potential clash between naval and maritime law enforcement vessels and aircraft is highly likely. Therefore, the need for some mechanism to regulate the activities of law enforcement vessels *other than* naval ships in the region is paramount. Some key stakeholders in the region are taking note of this issue. At the 12th Maritime Security and Coastal Surveillance Summit held in Malaysia in December 2015, the Chief of the Royal Malaysian Navy, Admiral Kamarulzaman Ahmad Badaruddin, called for an expansion of CUES 2014 to cover “other maritime agencies, especially the

⁷⁴ Quoted in *ibid.*

⁷⁵ See Chapter Seven for detailed discussion; see also Christopher P. Cavas, *Chinese Fighter Buzzes US Patrol Aircraft* (22 August 2014) Defense News
<<http://archive.defensenews.com/article/20140822/DEFREG02/308220025/Chinese-Fighter-Buzzes-US-Patrol-Aircraft>>.

coast guards.”⁷⁶ Singapore’s Foreign Affairs Minister, Vivian Balakrishnan, has also suggested expanding CUES 2104 to cover both naval and coast guards vessels and aircraft.⁷⁷ Another important consideration is that CUES 2014 only applies when naval ships and aircraft of different States meet “casually or unexpectedly.” In practice, however, most incidents at sea arise when naval vessels or aircraft of one State deliberately act in a way that poses a potential threat to the safety of naval vessels or aircraft of another State.⁷⁸ Thus, the reality is that in order to protect sovereignty and maritime claims over disputed areas, vessels and aircraft of concerned States usually shoulder or harass one another deliberately, not unexpectedly. CUES 2014, however, does not ban certain acts of military intimidation. For example, the U.S.-Soviet INCSEA 1972 Agreement prohibits ships of the Parties from “simulat[ing] attacks by aiming guns, missile launchers, torpedo tubes, and other weapons in the direction of a passing ship of the other Party.”⁷⁹ CUES 2014 only suggests that acts including the “simulation of attacks by aiming guns, missiles, fire control radars, torpedo tubes or other weapons in the direction of vessels or aircraft encountered...*might generally [be] avoided* (emphasis added).”⁸⁰ This means that ship commanders need to determine how they will implement CUES 2014 in certain circumstances. Furthermore, while INCSEA 1972 requires parties to notify one another “not less than 3 to 5 days in advance” in

⁷⁶ See Prashanth Parameswaran, *Malaysia Wants Expanded Naval Protocol Amid South China Sea Disputes* (4 December 2015) The Diplomat <<http://thediplomat.com/2015/12/malaysia-wants-expanded-naval-protocol-amid-south-china-sea-disputes/>>.

⁷⁷ For further details, see Lee YingHui, ‘Expanding CUES: Singapore’s Timely Proposal’ (2016) 63(24 March) *RSIS Commentaries* 1-3.

⁷⁸ See the Hainan incident and the Cowpens incident which are critically analysed in Chapter 7.

⁷⁹ *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972) (hereafter INCSEA 1972), Art 3.

⁸⁰ Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014, Art 2.8.

respect of actions which “represent a danger to navigation or to aircraft in flight”⁸¹, CUES 2014 only encourages parties to provide “warnings” of dangerous activities, eschewing any timeframe for when these warnings should be issued.⁸²

Thirdly, the geographic scope of CUES 2014 is unclear. After the Code was approved, U.S. naval officials were hopeful that all WPNS members would observe the code in all places.⁸³ However, Senior Captain Ren Xiaofeng, head of the Chinese navy's Maritime Security and Safety Policy Research Division, made it clear that “[w]e're just talking about the rules. Whether or where or when these rules will apply – [CUES 2014] it leaves that open, leaves it to bilateral [talks].”⁸⁴ Many commentators believe that CUES 2014 only applies in the EEZ and on the high seas, but not in the territorial waters.⁸⁵ According to Xu Hongmeng, Vice Admiral of the Chinese Navy, CUES 2014 would have no impact on the conduct of State parties in the disputed waters of the East China Sea and the South China Sea.⁸⁶ Vice Admiral Xu added: “You can't say that [CUES 2014 is] related to the issues in the South and East China Sea – this is about the navies of many countries... this will not influence those issues.”⁸⁷ When Japanese Defence Minister Itsunori Onodera stated at the WPNS press conference that CUES 2014 would ban dangerous actions such as radar-locking on ships and aircraft of other

⁸¹ INCSEA 1972, Art 6.

⁸² Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014, Art 2.10.

⁸³ Jeremy Page, *China Won't Necessarily Observe New Conduct Code for Navies* (23 April 2014) The Wall Street Journal

<<http://www.wsj.com/articles/SB10001424052702304788404579519303809875852>>.

⁸⁴ Quoted in *ibid.*

⁸⁵ See Mière, above n 63; Page, above n 83; Oliver Brauner, Joanne Chan and Fleur Huijskens, 'Confrontation and Cooperation in the East China Sea: Chinese Perspectives' (February 2015) *SIPRI Policy Brief* 1, 5; see also Sarabjeet Singh Parmar, *Naval symposium in China: Decoding the outcome* (29 April 2014) Institute for Defence Studies and Analyses

<http://www.idsa.in/idsacomments/NavalsymposiuminChina_ssparmar_290414>.

⁸⁶ Rajagopalan, above n 73.

⁸⁷ Quoted in *ibid.*

countries at sea,⁸⁸ Chinese Defence Ministry spokesman Yang Yujun expressed the view that “sides concerned should not misinterpret deliberately the CUES, which is a technical regulation under the multi-lateral framework, and make [a] selective reading of it to make a fuss.”⁸⁹ This means that different interpretations of CUES 2014 could be a challenging issue.

Fourthly, CUES 2014 does not contain any provisions for the safe conduct of submarine operations. With the proliferation of submarines in the region and the unresolved maritime disputes in the South China Sea, the risk of submarine accidents and incidents will surely increase.⁹⁰ According to Sam Bateman, “the detection of a submarine in disputed waters, unless carefully managed, could readily lead to a serious deterioration in relations between the parties involved, increased tensions in the region, and even conflict.”⁹¹ However, due to the covert nature of submarines, it is difficult to have an agreement in place governing standard operational procedures for such vessels. And despite interest from Russia in having an international agreement on the safety of submarine navigation, the United States has expressed reluctance to be bound by such an agreement.⁹²

Fifthly, CUES 2014 does not provide any guidelines for contracting parties regarding annual training and exercises. For many regional navies, and particularly

⁸⁸ Chinese naval vessels have directed their fire-control radars at Japanese warships and helicopters on several occasions. Indeed, this type of conduct has the capacity to escalate existing tensions into dangerous, even violent conflict. See Martin Fackler, *Japan Says China Aimed Military Radar at Ship* (5 February 2013) New York Times <http://www.nytimes.com/2013/02/06/world/asia/japan-china-islands-dispute.html?_r=0>.

⁸⁹ Guo Renjie, *Chinese military refutes misinterpretation of Code for Unplanned Encounters at Sea* (24 April 2014) Ministry of National Defense of the People's Republic of China <http://eng.mod.gov.cn/Press/2014-04/24/content_4505312.htm>.

⁹⁰ Sam Bateman, 'Confidence-Building Measures for the South China Sea' in Euan Graham and Henrick Z. Tsjeeng (eds), *Navigating the Indo-Pacific Arc* (Nanyang Technological University, 2014) , 84.

⁹¹ Sam Bateman, 'Perils of the Deep: The Dangers of Submarine Proliferation in the Seas of East Asia' (2011) 7(1) *Asian Security* 61, 61.

⁹² See *Russia Navy C-in-C urges submarine navigation agreement* (5 March 2007) Sputnik <<http://sputniknews.com/russia/20070305/61575903.html>>.

those of Southeast Asian States, language barriers and financial limitations are the main factors hampering the effectiveness of training and the general implementation of CUES 2014. The WPNS should therefore consider reaching an agreement to provide language training for naval officers from small regional navies, as well as providing financial support to assist smaller navies conduct CUES training at sea.

Lastly, there is no timeframe for the implementation of CUES 2014. At the 2014 WPNS in Qingdao, (and after CUES 2014 was approved), Rear Admiral Anne Cullerre, Commander of French Maritime Forces in the Pacific, stated: “I do hope that all of us will use the CUES in a very short time frame, but I also realize that some navies might need more time to get accustomed to these procedures than others.”⁹³ As this comment highlights, a precise timeframe for the implementation of CUES 2014 remains elusive. Indeed, since the adoption of CUES 2014, there have been only a few combined military exercises involving South China Sea littoral States. In June 2014, the Chinese navy conducted its first combined exercise with the Indonesian navy focussing on the practice of CUES 2014 procedures⁹⁴. In April 2015, Vietnamese and U.S. navies engaged in a coordinated military exercise in the coastal waters of Vietnam, practising CUES 2014 procedures as well as search and rescue related activities.⁹⁵ In May 2015, the Philippine Navy held a combined exercise with the Japanese navy in the South China Sea to run through CUES 2014 practices and procedures.⁹⁶ China also has conducted a number of CUES exercises with the United States, Australia and

⁹³ Quoted in Page, above n 83.

⁹⁴ Yao Jianing, *Chinese training ship taskforce wraps up visit to Indonesia* (9 June 2014) China Military Online <http://english.chinamil.com.cn/news-channels/china-military-news/2014-06/09/content_5948751.htm>.

⁹⁵ *Vietnam-US joint military exercise* (9 April 2015) Vietnam Breaking News <<http://www.vietnambreakingnews.com/2015/04/vietnam-us-joint-military-exercise/>>.

⁹⁶ Tim Kelly and Manuel Mogato, *Japan, Philippines to hold first naval drill in South China Sea - sources* (8 May 2015) Reuters <<http://in.reuters.com/article/2015/05/08/southchinasea-philippines-japan-idINKBN0NT1E820150508>>.

Singapore. However, combined exercises for CUES practice between East and South China Sea littoral States are still limited.

In summary, CUES 2014 is an important step towards improving confidence between navies. However, as a non-legally binding document with unclear geographical scope, CUES 2014 appears rather weak. As CUES 2014 only applies to naval vessels and aircraft that meet “casually or unexpectedly” at sea, it cannot prevent deliberate brinksmanship.⁹⁷ Moreover, it is unclear when, where and to what extent States will implement CUES 2014. As many incidents between sovereign immune vessels and aircraft in the South China Sea do not involve naval ships or aircraft, CUES 2014 will have little impact on preventing such problems.

8.2.3 Bilateral agreements for confidence building measures

8.2.3.1 Incidents at sea agreements

Apart from regional initiatives, there has been a number of bilateral maritime confidence building measures between extra-regional States addressing the passage of sovereign immune vessels and aircraft at sea. The most notable is the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas (INCSEA 1972), which entered into force 25 May, 1972.⁹⁸ INCSEA 1972 aims to “assure the safety of navigation of the ships of their respective armed forces on the high seas and flight of their military aircraft over the high seas, and guided by the

⁹⁷ James Manicom, *Confidence, Trust and the CUES* (21 May 2014) Centre for International Governance Innovation <<https://www.cigionline.org/blogs/asia-pacific-security/confidence-trust-and-cues>>.

⁹⁸ See *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972).

principles and rules of international law.”⁹⁹ In May 1973, at the first annual review of INCSEA 1972, the two sides added a Protocol to include non-military ships.¹⁰⁰ Article 2 of the Protocol makes it clear that:

Ships and aircraft of the Parties shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes and other weapons at non-military ships of the other Party, nor launch nor drop any objects near non-military ships of the other Party in such a manner as to be hazardous to these ships or to constitute a hazard to Navigation.¹⁰¹

INCSEA 1972 was considered successful in reducing the number of incidents between the two parties. For example, the number of serious incidents at sea between the United States and the Soviet Union reduced from about 100 per year in the late 1960s to approximately 40 per year in the early 1980s.¹⁰² With more than 150 U.S. and Soviet Union warships presenting in the Mediterranean during 1973 when war broke out in the Middle East, the two sides appeared to comply with INCSEA 1972.¹⁰³ Furthermore, as the Russian Federation was prepared to take over the rights and obligations of the Soviet Union in relation to this agreement, it remains in place today.¹⁰⁴ Unlike CUES 2014, INCSEA 1972 not only established communication regulations between vessels and aircraft of State parties in close proximity to one another at sea, but also requires vessels and aircraft of all sides to avoid executing manoeuvres which embarrass or endanger the ships under surveillance, and to avoid

⁹⁹ Ibid.

¹⁰⁰ See Protocol to the Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas Signed May 25, 1972 (entered into force 22 May, 1973).

¹⁰¹ Ibid, art 3.

¹⁰² Chai Wen Chung, 'Application of INCSEA Principles to the Taiwan Strait' (June 2003) *Cooperative Monitoring Center Occasional Paper* 1, 12.

¹⁰³ David F Winkler, 'The Evolution and Significance of the 1972 Incidents at Sea Agreement' (2005) 28(2) *Journal of Strategic Studies* 361, 369.

¹⁰⁴ See Department of the Navy, *OPNAV Instruction 5711.96C* (10 November 2008).

aiming weapons in the direction of a passing ship or aircraft of the other party.¹⁰⁵ There have been a number of incidents at sea agreements modelled on INCSEA 1972. These include the agreements between Russia and the Republic of Korea (1994)¹⁰⁶; Japan and Russia (1993); the UK and Soviet Union (1986); as well as between the Soviet Union and Germany, Canada, France, and Italy respectively (1988 and 1989)¹⁰⁷.

Within the South China Sea region, the navies of Indonesia and Malaysia reached an agreement known as the MALINDO Prevention of Sea Incidents Cooperative Guidelines in January 2001. These Guidelines provide standard safety and communication procedures which apply to naval ships and aircraft of the two States during encounters at sea.¹⁰⁸ This bilateral agreement emphasizes that:

While no compromise should be made on matters concerning a nation's integrity and sovereignty, incidents at sea could still be prevented by regulating and conditioning the behaviour and actions of Commanding Officers of warships and military aircraft, especially those assigned to frontline operations.¹⁰⁹

The agreement came into force on the date of signing by both parties and applies to all maritime regimes relevant to the LOSC, including disputed maritime territories.¹¹⁰ This means that the agreement will apply when naval vessels and aircraft of Indonesian and Malaysian navies encounter each other in the South China Sea. However, the agreement does not prevent third parties from taking provocative action in disputed areas, particularly the South China Sea. Moreover, the agreement applies purely to

¹⁰⁵ *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972).

¹⁰⁶ See *Agreement between the Government of the Republic of Korea and the Government of the Russian Federation Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea*, signed 2 June 1994 (entered into force 2 July 1994).

¹⁰⁷ See Justin Jones, 'Background paper: A naval perspective of maritime confidence building measures' (ASPI Special Report, September 2013), 25.

¹⁰⁸ MALINDO Prevention of Sea Incident Cooperative Guidelines (Jakarta 18 January 2001).

¹⁰⁹ Ibid art 1.

¹¹⁰ Ibid art 4.

naval units of the two navies; it does not apply to civilian law enforcement vessels or aircraft.

8.2.3.2 China-United States bilateral agreements

In 1998 China and the United States agreed to establish a Military Maritime Consultative Agreement (MMCA) which aims to avoid misunderstandings and miscalculations between the naval and air forces of the two parties when they operate near one another. However, the Agreement does not set out any standard safety procedures, such as how the naval ships and aircraft of the two States should behave when they encounter each other at sea.¹¹¹ According to David Griffiths, the MMCA “was much more diplomatic in nature and tone than the classic INCSEA model, minimizing the role of operational experts and containing no provision for real-time tactical communication.”¹¹² The numerous incidents which have occurred between U.S. and Chinese vessels and aircraft, the most notable being the EP-3 Hainan incident in 2001,¹¹³ clearly indicates that the MMCA has been ineffective. Some authors have even expressed the view that the biggest achievement of the MMCA “has been that the two countries are actually holding meetings.”¹¹⁴ With the increasing number of incidents at sea between China and the United States, however, there have been calls for an INCSEA agreement between the two States. However, according to Sam Bateman, China and the United States may not be interested in having such an agreement in

¹¹¹ See *Agreement between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety* (entered into force 19 January 1998).

¹¹² David Griffiths, *U.S.-China Maritime Confidence Building: Paradigms, Precedents, and Prospects* (China Maritime Studies Institute, Naval War College, 2010), 26.

¹¹³ See Chapter 7 for a detailed discussion of the EP-3 Incident.

¹¹⁴ Zhang Yuan and Hu Dekun, *Sino-US Maritime Incident Prevention and Military Confidence Building* (25 June 2014) China Institute of International Studies <http://www.ciiis.org.cn/english/2014-06/25/content_7007649.htm>.

place.¹¹⁵ Admiral Gary Roughead, then U.S. Chief of Naval Operations, indicated in 2011 that an INCSEA agreement with China is unnecessary as it would result in a separate and exclusive agreement which could imply a strained relationship between the two navies.¹¹⁶ Former U.S. Deputy Assistant Secretary of State Randy Schriver has also pointed out that China is not interested in a “rules-based, operator-to-operator approach to safety on the high seas.”¹¹⁷ Another dissenting voice on the issue is Shirley Kan, who has asserted that tensions between the United States and China “have been based on different national interests rather than any misperception or misunderstanding.”¹¹⁸

Nonetheless, in November 2014, China and the United States signed two important agreements – a Memorandum of Understanding on Rules of Behaviour for Safety of Air and Maritime Encounters (Rules of Behaviour MoU),¹¹⁹ and a Memorandum of Understanding on Notification of Major Military Activities Confidence-Building Measures Mechanism (Notification MoU).¹²⁰ The Rules of Behaviour MoU provides standard safety procedures for military vessels and aircraft when they encounter each other at sea or in the air. The Annex to the Rules of Behaviour MoU providing for the safety of ship-to-ship encounters was completed and signed in November 2014, while the Annex providing for air-to-air encounters was signed in September 2015. The Rules of Behaviour MoU essentially relies on existing

¹¹⁵ See Bateman, above n 90, 83.

¹¹⁶ See Shirley A Kan, 'U.S.-China Military Contacts: Issues for Congress' (Congressional Research Service, 29 July 2014), 32; see also *Interview transcript: Admiral Gary Roughead* (18 January) Financial Times <<http://www.ft.com/intl/cms/s/0/993b0ca4-234d-11e0-8389-00144feab49a.html#axzz3Zc8qzqpf>>.

¹¹⁷ Quoted in Kan, above n 116, 32.

¹¹⁸ Ibid 28.

¹¹⁹ *Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters* (Washington and Beijing November 2014) (hereafter Rules of Behaviour MoU).

¹²⁰ *Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Notification of Major Military Activities Confidence Building Measures Mechanism* (Washington and Beijing November 2014) (hereafter Notification MoU).

multilateral agreements, particularly COLREGs and CUES 2014. Meanwhile, the Notification MoU aims to encourage the parties to exchange information about their respective country's security policies, strategies and related legal information, and to allow for reciprocal observation of military exercises and activities.¹²¹ These two major confidence building agreements are expected to lessen the frequency of naval incidents between China and the United States near China's coast, including in the South China Sea. However, as the MoUs are not legally binding, it is difficult to know to what extent each side will implement them (if at all). As James Kraska and Raul Pedrozo have observed, China does not tend to comply with legally binding requirements, and thus it is doubtful whether China would adhere to these (non-binding) MoUs.¹²² China's rejection of the arbitral tribunal award in the South China Sea arbitration is one example of the State rejecting a legally binding decision. The Rules of Behaviour MoU makes it clear that "this memorandum is made without prejudice to either Side's policy perspective on military activities in the Exclusive Economic Zone."¹²³ Given that almost all incidents at sea involving China and the United States have occurred due to different perspectives on foreign military activities in the EEZ, it is doubtful whether the Rules of Behaviour MoU will help prevent such incidents. Moreover, unlike other bilateral confidence building agreements, the two MoUs affirm that notifications between parties is voluntary, and that neither side should disclose to third parties the content of such notifications without the written consent of the other side. Some scholars have expressed the view that "these two features make it especially difficult for

¹²¹ See Notification MoU, annex I & II.

¹²² James Kraska and Raul P Pedrozo, *The US-China Arrangement for Air-to-Air Encounters Weakens International Law* (9 March 2016) Lawfare <<https://www.lawfareblog.com/contributors/jkraskaguest>>.

¹²³ See Rules of Behaviour MoU, Section V.

interested observers to know if the agreements are, in fact, being implemented.”¹²⁴ Indeed, the MoUs specify that the U.S. Department of Defense and China’s Ministry of National Defence are the only two agencies authorised to implement the MoUs. Thus, in light of the confidential nature of the MOUs, “it seems that other agencies within each government may not receive detailed assessments of progress unless the other side authorizes interagency information sharing.”¹²⁵

8.2.3.3 Bilateral agreements between littoral States

Other bilateral confidence building agreements between South China Sea littoral States appear to be very limited. In October 2010, Vietnam and the Philippines signed a Memorandum of Understanding (MoU) on Defence Cooperation, and in October 2011 the two navies adopted a MoU on Enhancement of Mutual Cooperation and Information Sharing.¹²⁶ In March 2012, the two navies signed an agreement on Standard Operating Procedures on Personnel Interaction in the Vicinity of Southeast Cay Island and Northeast Cay Island (in the Spratly Archipelago), with both sides agreeing to conduct coordinated maritime patrols in these overlapping waters.¹²⁷ Vietnam and the Philippines also agreed to establish a “hotline” between their coast guards for information sharing on maritime incidents. In practice, however, there have been no combined maritime patrols or exercises between the navies or coast guards of the two States. According to Carlyle Thayer, defence cooperation between Vietnam and the

¹²⁴ Mira Rapp Hooper and Bonnie S. Glaser, *In Confidence: Will We Know if US-China CBMs Are Working?* (4 February 2015) Center for Strategic and International Studies <<http://amti.csis.org/in-confidence-will-we-know-if-us-china-cbms-are-working/>>.

¹²⁵ Ibid.

¹²⁶ See Ngoc Hung, *Vietnamese frigates start an official visit to the Philippines* (24 November 2014) People's Army Newspaper <<http://en.qdnd.vn/defence-cooperation/vietnamese-frigates-start-an-official-visit-to-the-philippines/333132.html>>; see also *PH-Vietnam MOA on Defense Cooperation* Department of National Defense, Republic of the Philippines <<http://www.dndph.org/press-releases/ph-vietnam-mou-on-defense-cooperation>>.

¹²⁷ Carlyle A Thayer, *Is a Philippine-Vietnam Alliance in the Making?* (28 March 2014) The Diplomat <<http://thediplomat.com/2014/03/is-a-philippine-vietnam-alliance-in-the-making/>>.

Philippines “is progressing but at a rudimentary level.”¹²⁸ Although Vietnam and Malaysia signed a Memorandum of Understanding on Bilateral Defense Cooperation in August 2008,¹²⁹ cooperation between the two navies appears to be very limited. China and Vietnam signed a bilateral Agreement on Basic Principles Guiding the Settlement of Maritime Issues in 2011, with the Agreement leading to the establishment of a “hotline” in 2013 to deal with fisheries incidents in the South China Sea.¹³⁰ However, no guidelines have been developed for the safe conduct of their vessels and aircraft when they encounter each other at sea. Indeed, the sheer number of incidents between China and Vietnam in the South China Sea in recent years have proved that such mechanisms are not very successful.

In summary, there have been a number of bilateral maritime confidence building agreements involving the South China Sea littoral States. However, they appear to be weak and play very limited roles in preventing incidents at sea. Moreover, as maritime disputes in the South China Sea involve many countries, bilateral agreements are incapable of preventing third parties from taking provocative action.

8.2.4 Track II level efforts

A number of Track II level workshops have been organised to address prevailing issues in the South China Sea. These include: (i) the Workshop Process on Managing Potential Conflicts in the South China Sea (SCS Workshop Process) initiated by

¹²⁸ Ibid.

¹²⁹ VN, *Malaysia aim for greater co-operation (in Vietnamese)* (5 April 2014) VietnamNews <<http://vietnamnews.vn/politics-laws/253300/vn-malaysia-aim-for-greater-co-operation.html>>.

¹³⁰ See Ramses Amer and Li Jianwei, *How to Manage China-Vietnam Territorial Disputes* (18 April 2013) China & US Focus <<http://www.chinausfocus.com/peace-security/how-to-manage-china-vietnam-territorial-disputes/>>.

Indonesia in 1989; (ii) the Council for Security Cooperation in the Asia Pacific (CSCAP), established in 1993; (iii) EEZ Group 21.¹³¹

The SCS Workshop Process was initiated by Indonesia's Ambassador Hasjim Djalal and Professor Ian Townsend-Gault of the University of British Columbia with financial support from the Canadian International Development Agency.¹³² The SCS Workshop Process is an informal workshop process, with all participants taking part in their personal capacities (i.e., without representing governmental positions). It aims to achieve three objectives: managing potential conflicts by seeking out areas of cooperation; developing confidence building measures and processes; and exchanging views through dialogue on certain issues.¹³³ To date, there have been 25 Workshops and a number of Technical Working Groups (TWG) and Group of Experts (GE) meetings.¹³⁴ In 2001, Canada decided to stop funding the workshop process because of a "lack of concrete results."¹³⁵ However, as participants originally agreed to take part in their personal capacities, thereby bypassing government bureaucracy, the SCS Workshop Process has continued. Even so, there have been different assessments on the success and failures of the SCS Workshop Process. In 1998, Townsend-Gault stated that

¹³¹ The SCS Workshop is an annually occurring dialogue process at Track II level which aims to manage potential conflicts by exploring areas of cooperation among littoral States in the South China Sea area. The EEZ Group 21 is a group of senior officials, legal experts and maritime specialists primarily from Asia-Pacific States sponsored by the Ocean Policy Research Foundation of Japan. The objective of the EEZ Group 21 is to reach a common understanding and approach to issues arising from the implementation of the EEZ regime. The CSCAP is a non-governmental process for dialogue on security issues in the Asia Pacific region. CSCAP activities are guided by a Steering Committee which is co-chaired by a member from an ASEAN Member Committee and a member from a non-ASEAN Member Committee. For further details, see the home page of the CSCAP <<http://www.cscap.org/>>.

¹³² Hasjim Djalal and Ian Townsend-Gault, 'Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention' in Chester A. Crocker, Fen Osler Hampson and Pamela R. Aall (eds), *Herding Cats: Multiparty Mediation in a Complex World* (United States Institute of Peace Press, 1999) 116.

¹³³ Ibid 119-25; Hasjim Djalal, 'Conflict Management Experiences in Southeast Asia: Lessons and Implications for the South China Sea Disputes' (2011) 3(4) *Asian Politics and Policy* 627, 629; see also Yann Huei Song, 'The South China Sea Workshop Process and Taiwan's Participation' (2010) 41(3) *Ocean Development & International Law* 253, 256.

¹³⁴ See Song, above n 133, 258.

¹³⁵ Yann Huei Song, 'The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks' (2003) 34 *Ocean Development & International Law* 229, 249.

“bringing together participants from the entire region was something of an accomplishment.”¹³⁶ In this regard, it is important to note that the SCS Workshop Process is the only regional forum focussing on the management of potential conflicts in the South China Sea in which both Taiwan and China regularly participate. At the 16th SCS Workshop held in Bali in 2006, Indonesian Ambassador Djalal commented that if potential conflicts in the South China Sea have not become a reality, or have not developed into conflict, the SCS Workshop Process will have been successful, and the moment the potential conflicts become a reality, it may be considered a failure.¹³⁷ However, other authors have expressed the view that the workshop processes have “failed to get the claimant countries to work together meaningfully”¹³⁸, with participants having had “little influence on their respective governments for the most part.”¹³⁹ Indeed, there is some force in that assessment, because although discussions continue even today, no outcome has been reached.

CSCAP is a non-governmental process for dialogue on security issues in the Asia Pacific. The purpose of the CSCAP is to provide “a structured process for regional confidence building and security cooperation among countries and territories in the Asia Pacific region.”¹⁴⁰ CSCAP currently has 21 full members representing all major States in the Asia Pacific region. CSCAP activities are guided by a Steering Committee which is co-chaired by a member from an ASEAN Member Committee and a member from a

¹³⁶ Ian Townsend-Gault, 'Preventive Diplomacy and Pro-Activity in the South China Sea' (1998) 20(2) *Contemporary Southeast Asia* 171, 184.

¹³⁷ See Transcript in the *Proceedings of the 16th Workshop on Managing Potential Conflicts in the South China Sea, Bali, 23-24 November 2006* (Policy Analysis and Development Agency, Department of Foreign Affairs, Republic of Indonesia), Annex 2, 13-19.

¹³⁸ J N Mark, 'Sovereignty In ASEAN and The Problem of Maritime Cooperation in the South China Sea' (2008) *Working Paper No.156, S. Rajaratnam School of International Studies*, 18.

¹³⁹ Leszek Buszynski, 'The South China Sea: Avenues Towards a Resolution of the Issue' in Tran Thuy Truong (ed), *The South China Sea: Cooperation for Regional Security and Development* (Diplomatic Academy of Vietnam, 2010) 185.

¹⁴⁰ See the CSCAP home page at < <http://www.cscap.org/>>.

non-ASEAN Member Committee. There have been a number of Study Groups established by the Steering Committee for the purpose of producing memoranda that outline “practical policy-oriented responses for consideration at Track One (official) level.”¹⁴¹ To date, 27 CSCAP Memoranda addressing a variety of issues have been published and circulated to regional decision and policy makers. Regarding navigation and communication at sea, these Memoranda include Guidelines for Regional Maritime Cooperation; a Memorandum on Cooperation for Law and Order at Sea; Guidelines for Maritime Cooperation in Enclosed and Semi-enclosed Seas and Similar Sea Areas of the Asia Pacific; and a Memorandum on Maritime CBMs, Trust and Managing Incidents at Sea.¹⁴² It is important to note, however, that CSCAP does not provide detailed guidelines or proposals for the safety of navigation and communication at sea, or for present purposes, the passage of sovereign immune vessels and aircraft.

Unlike the SCS Workshop Process and the CSCAP, however, EEZ Group 21 does focus on the passage of sovereign immune vessels and aircraft, particularly in the EEZs of coastal States. EEZ Group 21 was a group of senior officials, legal experts and maritime specialists primarily from Asia-Pacific States who participated in a series of meeting held from 2002-2005, sponsored by Japanese Ocean Policy Research Foundation. The aim of Group 21 was to produce “a set of non-binding, voluntary principles, which could provide the basis for a common understanding and approach to issues arising from the implementation of the EEZ regime.”¹⁴³ In September 2005, Group 21 reached an agreement named Guidelines for Navigation and Overflight in the

¹⁴¹ Ibid.

¹⁴² See *Memoranda* (27 June 2015) Council for Security Cooperation in the Asia Pacific <<http://www.cscap.org/index.php?page=memoranda>>.

¹⁴³ Sam Bateman, 'Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone' (2005) (144) *Maritime Studies* 17, 17.

Exclusive Economic Zone (Guidelines).¹⁴⁴ These Guidelines are based primarily on the LOSC, the practice of States, as well as emerging “soft” law,¹⁴⁵ and are designed to “ensure the safety and security of navigation in the EEZ” and to “promote understanding of the rights and duties of States conducting military and intelligence gathering activities in the EEZ of another State, and thus contribute to peace, good order, and security at sea.”¹⁴⁶

Significantly, the Guidelines provide definitions for certain activities in the EEZ which are absent from the LOSC, among them “hydrographic surveys”, “maritime scientific research”, “maritime surveillance”, and “military activities”. In addition to these definitions, the Guidelines contain substantive provisions covering the above activities. However, the Guidelines have failed to garner support from concerned States, and regional organisations have refused to discuss them on the basis that they are “too ambitious in their scope by covering more activities and in greater detail than [is] acceptable to some stakeholders in regional maritime security.”¹⁴⁷ For example, article XI of the Guidelines (which addresses military activities in the EEZ), contains 8 subparagraphs covering military activities in such detail that that the freedoms of navigation and overflight in the EEZ are somewhat restricted.¹⁴⁸ Article IX of the Guidelines (regarding hydrographic surveys), states that “[h]ydrographic surveying should only be conducted in the EEZ of another State with the consent of the Coastal State.”¹⁴⁹ As the LOSC does not contain any provisions regarding hydrographic surveys

¹⁴⁴ Ibid.

¹⁴⁵ Mark J Valencia and Kazumine Akimoto, 'Guidelines for navigation and overflight in the exclusive economic zone' (2006) 30 *Maritime Policy* 704, 704.

¹⁴⁶ See the text of the guidelines in Bateman, above n 143, Annex B.

¹⁴⁷ Kazumine Akimoto, *Introduction to the Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific* (14 May 2015) From the Oceans <http://oceans.oprf-info.org/analysis_en/c1406.html>.

¹⁴⁸ See the text of the Guidelines in Bateman, above n 143, Annex B.

¹⁴⁹ Ibid.

in foreign EEZs, this particular article has not been accepted by some States, including the United States. Indeed, in this regard Mark Valencia has asserted that the United States has rejected “any and all such guidelines as unacceptable.”¹⁵⁰ According to Raul Pedrozo, “such guidelines are clearly coastal State-oriented and are aimed at restricting high seas freedoms of navigation and overflight set forth in UNCLOS and other international instruments.”¹⁵¹ Pedrozo has proffered the view that the Guidelines “are simply an effort to renegotiate the EEZ provisions of UNCLOS that were widely accepted by the majority of the delegations at UNCLOS III.”¹⁵²

In 2012 and 2013, the Ocean Policy Research Foundation organised two meetings in Hakone and Tokyo to review the Guidelines and make them more widely accepted.¹⁵³ One of the outcomes of these meetings was a change in the name of the Guidelines to the Principles for Building Confidence and Security in the Exclusive Economic Zone of the Asia-Pacific (Principles). The main focus points of the Principles are “the central issues of misunderstanding and ambiguity with regard to rights and duties in the EEZ.”¹⁵⁴ The Principles still reflect the chief objectives of the Guidelines; however, they are less detailed in order to “avoid restricting activities in the EEZ more than necessary.”¹⁵⁵

Another outcome of the two meetings was the deletion of articles II and III from the Guidelines. The rights and duties of coastal and other States are now found in articles IV and V of the Principles, and cover maritime surveillance and military activities. Article VII of the Guidelines, which dealt with the suppression of piracy and

¹⁵⁰ Mark Valencia, 'The Impeccable Incident: Truth and Consequences' (2009) 5(2) *China Security* 26, 38.

¹⁵¹ Raul Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9(1) *Chinese Journal of International Law* 9, 28.

¹⁵² *Ibid.*

¹⁵³ Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific (Ocean Policy Research Foundation, 2013), 1.

¹⁵⁴ *Ibid.* 2.

¹⁵⁵ Akimoto, above n 147.

other unlawful activities, has also been deleted “with the recognition that international antipiracy activities have now become quite common.”¹⁵⁶ Two new provisions – article III on “Due Regard in the EEZ” and article VIII on “Provisional Arrangements” have been added to the Principles. However, the Principles do not define the term “due regard”, and therefore article III of the Principles essentially repeats what is already mentioned in the LOSC. Article VIII of the Principles attempts to clarify LOSC article 74 with regard to provisional arrangements where boundaries between adjacent EEZs have not been agreed upon. This article states that: “Such arrangements include standard operating procedures, information-sharing, and prior notification of military activities in areas of overlapping claims...”¹⁵⁷ However, assuming concerned coastal States agree with this provision, how are the activities of third parties in these overlapping EEZs to be treated? As the LOSC does not require foreign States to give prior notice to coastal States for the carrying out of military activities in the EEZ, article VIII of the Principles seems to be inconsistent with the LOSC. Article IX of the Guidelines regarding hydrographic surveying was also deleted, with the issue of hydrographic surveys being subsumed under the broader category of “Maritime Scientific Research” in article VII of the Principles. Article VII (4) of the Principles states that “[h]ydrographic surveying in the EEZ requires consent of the coastal State when the data collected affects the exclusive rights and jurisdiction of the coastal State.”¹⁵⁸ However, this article is quite difficult to implement, as there are no objective means to assess whether and to what extent the data collected affects the rights and jurisdiction of the coastal State.

Table 8.1 shows the differences between the Guidelines and the Principles.

¹⁵⁶ Ibid.

¹⁵⁷ Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific (Ocean Policy Research Foundation, 2013).

¹⁵⁸ Ibid.

Table 8.1 Contents of the Guidelines and the Principles

Guidelines	Principles
I. Definitions	I. Introduction
II. Rights and Duties of the Coastal State	II. Definitions
III. Rights and Duties of Other States	III. Due Regard in the EEZ
IV. Maritime Surveillance	IV. Maritime Surveillance
V. Military Activities	V. Military Activities
VI. Non-interference with Electronic Systems	VI. Non-interference with Electronic Systems
VII. Suppression of Piracy and Other Unlawful Activities	VII. Maritime Scientific Research
VIII. Maritime Scientific Research	VIII. Provisional Arrangements
IX. Hydrographic Surveying	IX. Transparency of Legislation
X. Transparency of Legislation	

Source: Kazumine Akimoto, Introduction to the Principles for Building Confidence and Security in the Exclusive Economic Zone of the Asia-Pacific

In summary, the Guidelines and Principles are laudable Track II level efforts in building confidence and security in the EEZ. However, as they contain a number of provisions that are not accepted by maritime States (including the United States), it is unlikely that the Guidelines or the Principles will be discussed at any official regional forum.

8.2.5 The U.S. Freedom of Navigation Program

In response to excessive maritime claims by numerous States, in 1979 the U.S. government (under the Carter Administration) established a formal program known as the U.S. Freedom of Navigation (FON) Program to challenge excessive claims by “a

peaceful exercise of the rights and freedoms of navigation and overflight recognized under international law.”¹⁵⁹ The FON program is a presidential-national level program jointly administered by the Department of Defense and the Department of State, and based on the legal regime of the LOSC.¹⁶⁰ Put simply, the Department of State responds to excessive maritime claims through diplomatic protests or consultations with the States concerned, while the Department of Defense responds through operational assertions carried out by the Navy. According to J. Ashley Roach and Robert W. Smith, “the necessity for diplomatic communications and operational assertions to maintain the balance of interests reflected in the LOS Convention as law is often not well understood.”¹⁶¹ More than 30 years after the entry into force of the LOSC, the United States remains outside of the Convention. However, the FON program has been continued as a means to “exercise and assert [U.S.] navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [Law of the Sea] convention.”¹⁶² Since the FON Program began, more than 110 diplomatic protests have been filed and over 300 operational assertions have been conducted.¹⁶³ According to Roach and Smith, the FON Program has been successful in reducing excessive maritime claims and persuading States to bring their domestic legislation into close conformity with the LOSC.¹⁶⁴ Moreover, the

¹⁵⁹ Department of State, *Limits of the Seas: United States Responses to Excessive Maritime Claims* (United States Department of State, 1992) 6.

¹⁶⁰ Ashley J. Roach and Robert W. Smith, *Excessive Maritime Claims* (Martinus Nijhoff 2012), 6.

¹⁶¹ *Ibid* 9.

¹⁶² See *President's Statement on United States Oceans Policy* (10 March 1983) <<http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm>>.

¹⁶³ See Roach and Smith, above n 160, 8; see also Dennis Mandsager, 'The U.S. Freedom of Navigation Program: Policy, Procedure, and Future' in Michael N. Schmitt (ed), *The Law of Military Operations* (Naval War College Press, 1998) 114.

¹⁶⁴ Roach and Smith, above n 160, 638; For instance, many States that originally claimed a territorial sea broader than 12 nautical miles have rolled back such claims. Within the South China Sea region, Vietnam and the Philippines are the two States that have brought their domestic laws into conformity with the LOSC.

FON Program has had somewhat of a deterrent effect, with a number of States eschewing excessive maritime claims for fear of being challenged by the United States¹⁶⁵ One example of the FON Program preserving navigational rights and freedoms can be seen in the 1988 Black Sea “bumping” incident between U.S. and former Soviet warships. Indeed, this FON operation led to an agreement between the two maritime powers over the interpretation of LOSC provisions on the innocent passage of warships in the territorial sea.¹⁶⁶ There have also been a number of operational assertions under the FON Program to challenge excessive maritime claims made by South China Sea littoral States, including China, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam.¹⁶⁷ During the period of 1 October 2013 to 30 September 2014, the FON Program carried out 19 State challenges in order to preserve the rights, freedoms, and uses of the sea and airspace guaranteed to all States under the LOSC.¹⁶⁸ Indeed, for several years the United States has challenged China’s excessive maritime boundary claims, as well as the State’s imposed restrictions on foreign military activities in its EEZ and claims to security jurisdiction outside of its territorial sea.¹⁶⁹ Recently the FON Program has challenged China’s restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) where there is no intent to enter China’s national airspace, as well as to China’s domestic law criminalising survey activities by foreign

¹⁶⁵ George Galdorisi, 'The US Freedom of Navigation Program Preserving the Law of the Sea' (1994) 25 *Ocean & Coastal Management* 179, 186.

¹⁶⁶ See Mandsager, above n 163, 123; see also *Joint Statement by the United States of America and the Union of Soviet Socialist Republics* <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf>.

¹⁶⁷ See Marcus Weisgerber, *Annual DoD Report Claims Steady Chinese Military Expansion* (6 May 2013) Defense News <<http://www.defensenews.com/article/20130506/DEFREG02/305060008/>>.

¹⁶⁸ See *DoD Annual Freedom of Navigation (FON) Reports* (8 June 2015) U.S. Department of Defense <<http://policy.defense.gov/OSDPOffices/FON.aspx>>.

¹⁶⁹ Douglas Gates, *Protecting Freedom of Navigation in the South China Sea* (28 May 2015) The Diplomat <<http://thediplomat.com/2015/05/protecting-freedom-of-navigation-in-the-south-china-sea/>>.

entities in its EEZ.¹⁷⁰ There have also been a number of incidents between U.S. and Chinese vessels and aircraft in the South China Sea.¹⁷¹ In response to China's massive "land reclamations" in the Spratlys, the United States sent its Freedom-class littoral combat ship, the USS *Fort Worth*, to patrol the maritime area near China's artificial islands in the Spratlys on 11 May 2015. During the patrol, the USS *Fort Worth* came across multiple Chinese warships, but as Commander Matt Kawas of the *Fort Worth* confirmed, the interactions between the warships of the two States was professional and in accordance with CUES 2014.¹⁷² Indeed, this interaction represents a positive sign for the implementation of CUES 2014. Even so, CUES 2014 will be tested if the United States continues to patrol this maritime area. And in light of several recent incidents in the area, it would appear that the U.S. Navy has no plans to cease its close monitoring of the region. On 20 May 2015, when a U.S. P8-A Poseidon surveillance aircraft conducted overflights over China's artificial islands in the Spratlys, it was warned by the Chinese navy that it was approaching "a military alert zone" and that it should leave the area "to avoid misjudgement."¹⁷³ However, the U.S. pilot replied that the aircraft was conducting lawful military activities outside national airspace.¹⁷⁴ In October 2015, a U.S. guided-missile destroyer, the USS *Lassen*, conducted a freedom of navigation patrol within 12 nautical miles of an artificial island built by China on the Subi Reef in the Spratlys¹⁷⁵. In January 2016, the USS *Curtis Wilbur*, exercised innocent passage

¹⁷⁰ See *DoD Annual Freedom of Navigation (FON) Reports* above n 168.

¹⁷¹ For more information, see Chapter Seven.

¹⁷² Brad Lendon and Jim Sciutto, *China cautions U.S. Navy on patrols in South China Sea* (14 May 2015) CNN <<http://edition.cnn.com/2015/05/13/politics/south-china-sea-us-surveillance-aircraft/>>.

¹⁷³ See James Hardy, *US steps up South China Sea PR battle with P-8 surveillance flights over Spratlys* (25 May 2015) IHS Jane's 360 <<http://www.janes.com/article/51633/us-steps-up-south-china-sea-pr-battle-with-p-8-surveillance-flights-over-spratlys>>.

¹⁷⁴ *Ibid.*

¹⁷⁵ See *South China Sea: China slams US over warship sailing near artificial islands; US ambassador 'summoned'* (28 October 2015) ABC News <<http://www.abc.net.au/news/2015-10-28/china-summons-us-ambassador-over-south-china-sea-patrol/6890786>>.

within 12 nautical miles of Triton Island claimed by China, Vietnam and Taiwan without giving prior notice to any of these claimant States.¹⁷⁶ And in May 2016 the USS *William P. Lawrence*, exercised innocent passage within 12 nautical miles of Fiery Cross Reef in the Spratly Islands, which the arbitral tribunal classifies as a “rock” under the LOSC.¹⁷⁷ At the 2015 Shangri-La Dialogue, U.S. Secretary of Defense Ashton Carter asserted that artificial islands do not confer sovereign rights.¹⁷⁸ Carter also stressed that “there should be no mistake: The United States will fly, sail and operate wherever international law allows, as we do all around the world.”¹⁷⁹ Likewise, Australia has asserted that it will continue to conduct patrols over the disputed islands in the South China Sea. In an interview with the *Wall Street Journal*, then Australian Defence Minister Kevin Andrews stated that “we’ve been doing it for decades, we’re doing it currently...and we’ll continue to do it into the future.”¹⁸⁰ On 23 June 2015, in an exercise with the Philippine military, a Japanese P3-C Orion surveillance plane circled over disputed waters near the Spratlys for the first time.¹⁸¹ In an interview with the *Wall Street Journal*, Admiral Katsutoshi Kawano, Chief of Joint Staff of Japan’s Self-Defence Forces, proposed that “we don’t have any plans to conduct surveillance in the

¹⁷⁶ Gordon Lubold and Jeremy Page, *U.S. Warship Sails Near Island Claimed by China* (31 January 2016) *Wall Street Journal* <<http://www.wsj.com/articles/u-s-warship-sails-near-island-claimed-by-china-1454131157>>.

¹⁷⁷ See *South China Sea Arbitration (The Philippines v People’s Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [563]; Brad Lendon and Jim Sciutto, *U.S. destroyer sails near disputed Chinese island* (10 May 2016) CNN <<http://edition.cnn.com/2016/05/10/politics/us-china-destroyer-sails-by-disputed-island/>>.

¹⁷⁸ See Michael Green, Ernest Bower and Mira Rapp-Hooper, *Carter Defends the South China Sea at Shangri-La* (1 June 2015) Asia Maritime Transparency Initiative <<http://amti.csis.org/carter-defends-the-south-china-sea-at-shangri-la/>>.

¹⁷⁹ Quoted in Craig Whitlock, *Defense secretary’s warning to China: U.S. military won’t change operations* (27 May 2015) *Washington Post* <<http://www.washingtonpost.com/news/checkpoint/wp/2015/05/27/defense-secretarys-warning-to-china-u-s-military-wont-change-operations/>>.

¹⁸⁰ Quoted in Rob Taylor, *Australia to Continue Military Patrols in South China Sea* (31 May 2015) *Wall Street Journal* <<http://www.wsj.com/articles/australia-to-continue-patrolling-south-china-sea-1433046154>>.

¹⁸¹ Manuel Mogato, *Japanese plane circles over China-claimed region in South China Sea* (23 June 2015) *Reuters* <<http://www.reuters.com/article/2015/06/23/us-southchinasea-philippines-idUSKBN0P30H120150623>>.

South China Sea currently but depending on the situation, I think there is a chance we could consider doing so.”¹⁸² After the ruling of the arbitral tribunal, it is possible that Japan will soon join the United States to patrol the South China Sea.

China has certainly adopted an aggressive stance in claiming sovereignty and sovereign rights in the South China Sea. In addition, China has refused to take part in international arbitration proceedings to settle disputes arising from the application of LOSC provisions, proudly proclaiming that “China views the law as a malleable tool to be trumpeted when it supports Chinese claims and ignored when it stands in their way.”¹⁸³ As China does not abide by the LOSC, other South China Sea littoral States (and the international community as a whole), may be justified in supporting initiatives similar to the FON Program to ensure the LOSC is respected and that the freedoms of navigation and overflight are safeguarded.

8.3 Conclusion

A number of regional initiatives have been devised to fill the gaps in the international law regime on the passage of sovereign immune vessels and aircraft at sea. These initiatives include regional agreements; bilateral agreements between States concerned; Track II level regional workshops; and unilateral State efforts. However, it appears that such efforts have not been very successful in preventing contentious incidents in the South China Sea. The geopolitical complexity of the South China Sea, coupled with the existing conflicts between regional States over LOSC provisions, have made this maritime area vulnerable to conflict. Indeed, incidents involving the passage of sovereign immune vessels and aircraft show no signs of abating. With increasing

¹⁸² Quoted in *Japan may consider South China Sea patrols* (28 June 2015) Japan Today <<http://www.japantoday.com/category/national/view/japan-may-consider-south-china-sea-patrols>>.

¹⁸³ Gates, above n 169.

tensions between States over sovereignty disputes and the freedom of navigation in the South China Sea, and particularly China's aggressive pattern of behaviour, the need for regional cooperation in terms of conflict management and conflict avoidance is arguably more pressing than ever before.

9 CHALLENGES AND THE WAY FORWARD

9.1 Introduction

Ensuring the safety and freedom of navigation at sea has been a critical State issue for centuries. Indeed, this issue constitutes a fundamental element of the international law of the sea and the law of the air. However, as international agreements are invariably the product of compromise, there are often gaps and ambiguities in their provisions. These gaps and ambiguities can be intentional or unintentional, and arise due to a lack of agreement between State Parties.¹ As a result, States tend to adopt conflicting interpretations of international law provisions – interpretations which accord with their own vested interests. The passage of sovereign immune vessels and aircraft at sea is a prime example of an issue on which States have adopted divergent opinions. Multiple incidents have occurred in the South China Sea region due to differing interpretations of international law provisions by coastal States and maritime user States. In order to fill the gaps and ambiguities in international maritime and aviation law, and to promote the safety and freedom of navigation and overflight, a number of regional initiatives have been devised. However, as demonstrated in Chapter Eight, such efforts have had limited success. This chapter will illustrate the remaining challenges regarding the passage of sovereign immune vessels and aircraft at sea, in the South China Sea. The discussion will also provide a number of legal and policy recommendations for addressing these challenges, while highlighting the implications for the future security, safety and freedom of navigation and overflight in the region.

¹ See Dennis Mandsager, 'The U.S. Freedom of Navigation Program: Policy, Procedure, and Future' in Michael N. Schmitt (ed), *The Law of Military Operations* (Naval War College Press, 1998) , 124.

9.2 Uncertain issues in international law

The first uncertain issue in the international law of the sea concerns the provisions of the United Nations Convention on the Law of the Sea (LOSC) – specifically the innocent passage of warships in the territorial sea of coastal States. As discussed in Chapter Four, the issue of whether warships enjoy the right of innocent passage, or whether coastal States require prior notification or authorisation in order for such a right to be exercised, was an area of disagreement between coastal States and maritime user States.² As a product of compromise, the LOSC does not contain any provisions directly addressing the innocent passage of warships. The LOSC affirms that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”³ However, as States have adopted different views on the question of the innocent passage of warships, their practices are far from uniform.⁴ This divergence of state practice, as well as the lack of judicial decisions regarding the innocent passage of warships, makes the formation of a universal customary rule on the topic very unlikely. Although more than 30 years have passed since the entry into force of the LOSC, at least 40 States still assert some form of requirement, either prior authorisation or notification, in their national laws and regulations for the passage of foreign warships through their territorial seas.⁵ In the South China Sea region, China requires prior authorisation, Taiwan, Vietnam and the Philippines all require prior notification for the passage of foreign warships through

² See Chapter Four for detailed discussion; see also Thomas Windsor, 'Innocent passage of warships in East Asian territorial seas' (2011) 3(3) *Australian Journal of Maritime and Oceans Affairs* 73, 73.

³ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994), [hereafter LOSC], Preamble.

⁴ Zou Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice' (1998) 29 *Ocean Development & International Law* 195, 198.

⁵ Shao Jin, 'The question of innocent passage of warships after UNCLOS III' (1989) (January) *Marine Policy* 56, 66; see Keyuan, above n 4, 206; see also Stuart Kaye, *Freedom of Navigation in Indo-Pacific Region*, Papers in Australian Maritime Affairs No 22 (Sea Power Centre, 2008), 8.

their territorial seas, while the current domestic regulations of Indonesia, Malaysia and Brunei are silent on the issue altogether.⁶

The second uncertain issue concerns foreign military activities in the EEZ. Indeed, the LOSC does not prescribe what types of military activities are permissible or prohibited in the EEZ of a foreign State. Coastal states have not been granted any right to regulate foreign military activities in their EEZ, while no express right regarding military activities has been granted to maritime user states. Commenting on this during UNCLOS III, the President of the Conference, Tommy T.B. Koh, stated that “nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.”⁷ Unfortunately this issue remains uncertain until today, and is arguably one of the most controversial issues to be debated in the international law of the sea. Some South China Sea coastal States, particularly China and Malaysia, have restrictive views on foreign military activities in their EEZs, while other maritime user States consider such activities to be part of the freedoms of navigation and overflight granted by the LOSC.

The third uncertain issue centres on the regime of islands under the LOSC. Article 121 of the LOSC defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.”⁸ Under this article, an island may be entitled to a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf.⁹ However, “[rocks] which cannot sustain human habitation or

⁶ See Chapter four for a more detailed discussion of this issue.

⁷ Quoted in Jon M. Van Dyke, 'Military ships and planes operating in the exclusive economic zone of another country' (2004) 28 *Marine Policy* 29, 31; see also Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012) 28(74) *Merkourios* 22, 26.

⁸ LOSC, art 121 (1).

⁹ LOSC, art 121 (2).

economic life of their own shall have no exclusive economic zone or continental shelf.”¹⁰ In its final award issued on 12 July 2016, the arbitral tribunal in the Philippines-China arbitration ruled that “none of the high-tide features in the Spratly Islands are capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3) of the [LOSC].”¹¹ Clive Schofield has commented that by clarifying the status of various offshore features in the South China Sea for the purpose of article 121, the tribunal’s decision “is hugely significant for the Law of the Sea’s development and international law generally.”¹² However, it is important to note that the arbitral tribunal’s award is only legally binding on the parties to the dispute.¹³ This raises the question: what is the position of other major powers? As just two examples, the United States claims an EEZ from Kingman Reef in Micronesia, and Japan claims an EEZ from Okinotorishima. However, according to M. Taylor Fravel, “[u]nder the precedent established by the tribunal, these features may not be entitled to the EEZ that states claim from them.”¹⁴ If the tribunal’s award is respected by States, then even though the tribunal’s decision will not directly change the navigational regimes of the LOSC, it would have indirect effects on navigational rights in the region by reducing the EEZs for which States have different views on navigational rights.

The fourth uncertain issue is the safe navigation of sovereign immune vessels at sea. The International Regulations for Preventing Collisions at Sea (COLREGs) are

¹⁰ LOSC, art 121(3).

¹¹ *South China Sea Arbitration (The Philippines v People's Republic of China) (Case No. 2013-19) (Award)* (Permanent Court of Arbitration, 12 July 2016) [646].

¹² Clive Schofield, *Explainer: what are the legal implications of the South China Sea ruling?* (13 July 2016) Conversation <<http://theconversation.com/explainer-what-are-the-legal-implications-of-the-south-china-sea-ruling-62421>>.

¹³ LOSC, Annex VII, art 11; see also Sam Bateman et al, 'Assessing the South China Sea Award' (2016) 108(August) *Strategic Insights* 1, 2.

¹⁴ M Taylor Fravel, *The Strategic Implications of the South China Sea Tribunal's Award* (13 July 2016) National Interest <<http://nationalinterest.org/feature/why-the-south-china-sea-tribunals-ruling-may-backfire-16951>>.

widely regarded as the maritime “rules of the road” and “apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.”¹⁵ Accordingly, sovereign immune vessels (with the exception of submerged submarines) are subject to COLREGs.¹⁶ There are a number of provisions in COLREGs that expressly apply to warships, including aircraft carriers, minesweepers and replenishment ships.¹⁷ However, rule 1 of the regulations makes it clear that a party to COLREGs shall attempt to achieve “the closest possible compliance” if it has “determined that a vessel of special construction or purpose cannot comply fully with the provisions of any of these Rules.”¹⁸ Due to the “special construction or purpose” of sovereign immune vessels, especially warships, these vessels are not required to comply with all the rules of COLREGs. It is for this reason that a number of incidents at sea agreements have been struck which apply exclusively to naval vessels and which reinforce the spirit of COLREGs.¹⁹ For instance, the 1972 Incidents at Sea Agreement between the United States and the Soviet Union states that the Parties “shall take measures to instruct the commanding officers of their respective ships to observe strictly the letter and spirit of [COLREGs].”²⁰ The Code for Unplanned Encounters at Sea (CUES 2014) also provides that Western Pacific Naval Symposium (WPNS) navies “are expected” to comply with COLREGs.²¹ However, as previously mentioned in

¹⁵ *International Regulations for Preventing Collisions at Sea*, adopted 20 October 1972 (entered into force 15 July 1977) [hereafter COLREGs] rule 1.

¹⁶ As the COLREGs definition of ‘vessel’ includes every description of water craft, including non-displacement craft and seaplanes, used or cable of being used as a means of transportation on water, submarines fall outside the definition.

¹⁷ COLREGs, rule 3.

¹⁸ COLREGs, rule 1.

¹⁹ See Chapter seven for a discussion of several Incidents at Sea agreements.

²⁰ *Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, signed 25 May 1972 (entered into force 25 May 1972), art II.

²¹ Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, adopted 22 April 2014, point 2.0.

Chapter Eight, non-naval law enforcement vessels and aircraft are not encompassed by CUES. Another convention which focuses on safe navigation at sea is the International Convention for the Safety of Life at Sea (SOLAS). SOLAS is “generally regarded as the most important of all international treaties concerning the safety of merchant ships.”²² Nevertheless, SOLAS does not apply to warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on government non-commercial service.

The fifth uncertain issue in international law relates to the interaction between military aircraft in international airspace. The Convention on International Civil Aviation (Chicago Convention) and the LOSC both require States to ensure their state aircraft operate with “due regard for the safety of navigation of civil aircraft.”²³ The Chicago Convention also requires that “[an] aircraft shall not be operated in such proximity to other aircraft as to create a collision hazard.”²⁴ Unfortunately, the Chicago Convention does not contain any provisions regarding the operation of State aircraft, including military and law enforcement aircraft, beyond the land areas and territorial waters of coastal States.

Lastly, there are no international rules governing the safe manoeuvre of submarines at sea. The LOSC requires submarines to navigate on the surface and to show their flags when they transit through the territorial sea of a coastal State.²⁵ However, according to Sam Bateman, “due to the very nature of submarine operations, this provision is honoured more in its breach rather than in its observation except in

²² *International Convention for the Safety of Life at Sea (SOLAS)*, 1974 International Maritime Organization <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx)>.

²³ Convention on International Civil Aviation, signed 7 December 1944 (entered into force 4 April 1947) [hereafter Chicago Convention], art 3; LOSC, arts 39, 54 & 87.

²⁴ Chicago Convention, art 3.

²⁵ LOSC, art 20.

circumstances when navigational conditions, particularly water depth, require that the submarine should travel on the surface.”²⁶ Submarines are treated as surface vessels when they transit above the water, and hence they are expected to comply with the “rules of the road” like other surface vessels. However, when submarines transit submerged there are no rules that apply to them. Indeed, it is impossible for submerged submarines of different States to communicate with each other as radio waves do not travel well underwater. Moreover, as submarines have very limited command, control and communication capabilities when submerged, if the commanding officers of the respective submarines fail to handle a tense situation in a professional way (and without the benefit of personnel ashore giving directions), the consequences could be very serious. With an increasing number of submarines in the South China Sea, the safety of submarine operations in the region is a challenging issue. This has led Singapore’s Navy Chief, Rear Admiral Lai Chung Han, to assert that: “[W]ith an increasing number of submarines operating in that congested and confined water space, it’s perhaps no exaggeration to say that it is an accident waiting to happen.”²⁷

9.3 Key drivers behind state practice

As the international law of the sea contains gaps and ambiguities, state practice in the South China Sea has been divergent. This section will outline a number of key drivers behind the practice of South China Sea littoral States in relation to the passage of sovereign immune vessels and aircraft.

The first key driver is preserving the sovereign rights and security interests of littoral States. China, Vietnam, Taiwan, the Philippines, Malaysia and Brunei all have

²⁶ Sam Bateman, ‘Perils of the Deep: The Dangers of Submarine Proliferation in the Seas of East Asia’ (2011) 7(1) *Asian Security* 61, 72.

²⁷ Quoted in Sharon Chen, *Busy South China Sea an Accident in the Making, Singapore Says* (20 May 2015) Bloomberg <<http://www.bloomberg.com/news/articles/2015-05-20/busy-south-china-sea-an-accident-in-the-making-singapore-says>>.

overlapping sovereignty claims in the South China Sea. However, as none of these claimant States are willing to compromise their claims, they have all tried to strengthen and consolidate their sovereignty and sovereign rights through various strategies. By virtue of its economic and military power, China has adopted a more assertive posture in its disputes with other Southeast Asian claimants. Indeed, China has used navy ships, maritime law enforcement vessels, fishing vessels, as well as oil-exploration rigs to safeguard its maritime claims in the South China Sea, ignoring international law rules and norms. Due to the operation of U.S. vessels and aircraft in the South China Sea, China applies a restrictive view on the passage of sovereign immune vessels and aircraft in the region, thereby allaying some of its security concerns. As a rising maritime power, China has become more confident in its dealings with the United States in the South China Sea. However, in order to avoid a major conflict, China has thus far used its civilian law enforcement forces and fishing vessels to confront U.S. military vessels operating in the area. Other Southeast Asian claimants, particularly Vietnam and the Philippines, have modified their domestic laws and regulations so that they conform to the LOSC, thereby gaining the support of the international community and maritime user States. Nevertheless, due to security concerns, the laws and regulations of these Southeast Asian States still contain some form of restriction on the passage of foreign military vessels and aircraft in their maritime zones, particularly in the territorial sea.

The second key driver is maintaining access to valuable resources in the South China Sea. China's placement of an oil rig in Vietnam's claimed EEZ is one example of a clash over resources. Furthermore, as the disputed areas of the South China Sea are believed to be rich in fish stocks as well as oil and gas deposits, certain States have strengthened their maritime law enforcement capabilities to better protect their resource claims. In the near future, there will undoubtedly be a heavy concentration of sovereign

immune vessels and aircraft deployed to the region. While China has become more assertive and aggressive in the South China Sea, other States have shown no signs of conceding anytime soon. As a result, intentional and unintentional incidents will continue to take place.

The third key driver is safeguarding the strategic interests of other concerned States in the South China Sea. As the security of sea lines of communication (SLOCs) in the South China Sea is pivotal to many States, any disruption to seaborne trade would pose significant threats to regional economies. As a result, maintaining the safety and freedom of navigation and overflight in the South China Sea is a key strategic interest for many States, particularly those dependent on the United States for their security. Indeed, by virtue of the navigation rights granted by the LOSC, the United States has been conducting freedom of navigation (FON) operational assertions in the South China Sea. By bolstering its territorial sovereignty and maritime claims in the South China Sea, China has attempted to push the United States from its mainland while projecting its power over the region. Thus, China and the United States have maintained contradictory views over the passage of military vessels and aircraft in their respective maritime zones. As a rising maritime power, China has become more assertive in enforcing its position. The United States, however, will continue to assert the freedom of navigation and overflight in the South China Sea in accordance with prevailing international law, as well as to maintain its power and influence in the region.

9.4 Regional initiatives have been ineffective

As discussed in Chapter Eight, there have been a number of regional initiatives at both the governmental level (Track-I) and non-governmental level (Track-II) to

address problems relating to the passage of sovereign immune vessels and aircraft at sea. However, for reasons canvassed below, these efforts have had very limited success.

There have been no regional or bilateral agreements at Track I level that address the passage of foreign warships in the territorial sea of coastal States, or the issue of foreign military activities in the EEZ. In addition, all regional initiatives and bilateral agreements discussed in Chapter Eight are non-legally binding mechanisms. As a result, the States concerned may not always be willing to act in conformity with these agreements. Furthermore, Sam Bateman has highlighted that regional agreements including CUES 2014 and the Rules of Behaviour for Safety of Air and Maritime Encounters (Rules of Behaviour MOU) operate at a tactical level rather than at an operational or strategic level.²⁸ Therefore, according to Bateman, it is essential to have a regional agreement in place that focuses on operational and strategic issues such as “safety zones around disputed features, restrictions on particular types of operations in particular areas such as submarine “no go” areas, hot lines, operational transparency, and prior notice of operations.”²⁹

Moreover, within disputed waters of the South China Sea, littoral States operate different types of (non-naval) law enforcement vessels and aircraft, including coast guard vessels, fisheries patrol vessels, as well as maritime law surveillance vessels. However, no safety guidelines have been devised for the interaction between these vessels and aircraft, or between naval vessels and military or state aircraft at sea. As a result, many contentious incidents involving these types of vessels and aircraft have occurred in the South China Sea region as described in Chapter Seven. Incidents

²⁸ Cited in Wendell Minnick, *Complex US-China Relations Seen at IMDEX* (24 May 2015) Defense News <<http://www.defensenews.com/story/defense/naval/navy/2015/05/24/imdex-singapore-china-us-warship-stabilize-islands-reclamation-south-sea-east/27712207/>>.

²⁹ Quoted in *ibid*.

involving coast guards and other civil maritime law enforcement services generally carry a lower risk of catastrophic clashes compared to warships. However, as Richard Bitzinger argues, “if clashes increase or the stakes are raised, they could escalate into more violent action involving navies.”³⁰ Unfortunately, no guidelines or recommendations for the safe manoeuvre of these types of vessels and aircraft have been discussed thus far.

The Association of Southeast Asian Nations (ASEAN) could potentially play an important role in maintaining stable maritime security and freedom of navigation in the region. However, it appears that differences between ASEAN States on South China Sea issues persist. As discussed in previous chapters, all ten ASEAN States have different strategic interests in the South China Sea. As a result, it is difficult for ASEAN to speak with one voice on maritime disputes in the region. In November 2015, the ASEAN Defence Ministers’ Meeting Plus (ADMM-Plus) was held in Malaysia with the participation of ten ASEAN defence ministers and eight of their counterparts from the United States, Japan, Australia, New Zealand, the Republic of Korea, China, Russia and India. However, for the first time in ASEAN’s history, a meeting of this type failed to issue a joint declaration on South China Sea issues as scheduled. According to Malaysian Defence Minister Hishammuddin Hussein, “the decision was made by ASEAN because there is no consensus, so no joint declaration [was] signed.”³¹ Another problem within ASEAN is that decision-making is based on consultation and consensus.³² If one pro-Beijing member does not agree on a particular issue, ASEAN

³⁰ Richard A. Bitzinger, 'IMDEX ASIA 2015 Coast Guards in the South China Sea: Proxy Fighters?' (2015) 121(20 May) *RSIS Commentaries* 1, 2.

³¹ Eunice Au, *Signing of declaration at defence forum cancelled over South China Sea* (4 November 2015) *Straits Times* <<http://www.straitstimes.com/asia/se-asia/signing-of-declaration-at-defence-forum-cancelled-over-south-china-sea-report>>.

³² Charter of the Association of Southeast Asian Nations, adopted on 20 November 2007, art 20.

cannot issue a declaration contrary to China's interests. The disunity within ASEAN over South China Sea issues surfaced again in June 2016, when ASEAN foreign ministers retracted a joint statement voicing "serious concern" over ongoing developments in the South China Sea which undermine peace, security and stability in the region. In this instance, the joint statement was retracted only a few hours after it was released. For Southeast Asia specialist, Ian Storey, "[i]t really looks not only like ASEAN is in disarray but also that it lacks any backbone."³³ It is clear that maintaining security and the freedoms of navigation and overflight in the South China Sea is very important to the region; however, eliciting a collective, unified voice from ASEAN on this issue has been fraught with difficulty.

Another issue affecting the success of regional initiatives is the Taiwan factor. Taiwan is one of the claimants in the South China Sea disputes. However, due to pressure from China, Taiwan cannot participate in any official regional security forum. Taiwan and China share identical maritime claims in the South China Sea, particularly the nine-dash line claims, with neither State clarifying whether they lay claim to all islands or waters within the nine-dash line. Other claimant States wish to exclude Taiwan from South China Sea negotiations because of their "one-China" policy, but also due to concerns that China and Taiwan could cooperate to strengthen their identical maritime claims in the region.³⁴ Taiwan currently occupies Itu Aba Island, the largest land feature in the Spratlys, and also boasts one of the largest fishing fleets in the region.³⁵ Moreover, Taiwanese coast guard vessels regularly conduct maritime patrols

³³ Quoted in Hannah Beech, *What a Retracted Statement Says About China's Growing Power in the South China Sea* (15 June 2016) Time <<http://time.com/4369660/asean-south-china-sea-statement/>>.

³⁴ See also Lynn Kuok, 'Tides of Change: Taiwan's evolving position in the South China Sea and why other actor should take notice' 5(May 2015) *East Asia Policy Paper*, 2.

³⁵ Ibid. See also *Role of Taiwan* (22 August 2015) Greenpeace <<http://www.greenpeace.org/eastasia/campaigns/oceans/problems/role-of-taiwan/>>.

in this area.³⁶ For this reason, any Code of Conduct or related agreement related to navigation and overflight in the South China Sea which does not have Taiwan's participation would not be fully effective. As the arbitral tribunal has discounted the nine-dash line, ASEAN could encourage Taiwan to clarify its maritime claims in the South China Sea in accordance with international law. Provided Taiwan's response accords with prevailing international law, ASEAN could then try to accept Taiwan as a party to the regional security forum, thus helping to improve the effectiveness of regional initiatives. As ASEAN member States have openly acknowledged the "one China" policy, it is unlikely that they will invite Taiwan to participate in any official regional forum. However, inviting Taiwan to participate at Track II level initiatives could help overcome this obstacle.

At Track II level, as noted in Chapter Eight, EEZ Group 21 has issued Guidelines and Principles documents. However, neither document has been adopted at any official regional forum. The reason behind the lack of uptake of either the Guidelines or the Principles is that both interpret the provisions of the LOSC in a regional but not global context. While most States around the world respect the freedoms of navigation and overflight in the EEZ as codified in the LOSC, some States in the Asia-Pacific, and particularly those in the South China Sea region, apply restrictive views to the issue of foreign military activities in the EEZ. Therefore, any attempt to reinterpret the provisions of the LOSC narrowly and with a particular regional focus is unlikely to be successful. Moreover, States went through many years of compromise, consensus-building and negotiation before the Convention was agreed. As a result, the LOSC contains provisions which are intentionally vague and

³⁶ Kuok, above n 34, 2.

ambiguous. Attempts to clarify these intentional ambiguities at Track-II level initiatives and with a regional focus are unlikely to be successful.

9.5 Maritime disputes are unlikely to be resolved

There are a number of reasons why the resolution of maritime disputes in the South China Sea is highly unlikely. Firstly, it is important to note that disputes may be resolved peacefully – either through negotiation between the States concerned or by referring the matter to an international court or tribunal. China, however, has eschewed submitting its territorial and maritime delimitation disputes to an independent and impartial body.³⁷ Accordingly, the resolution of China’s sovereignty disputes by an international court or tribunal is highly unlikely. Lee Kuan Yew, the late former Prime Minister of Singapore, has opined that “it is naive to believe that a strong China will accept the conventional definition of what parts of the sea around it are under its jurisdiction.”³⁸ Indeed, as China’s maritime power grows, “it seems less willing to be beholden to legal norms enshrined in the United Nations Convention on the Law of the Sea.”³⁹

Secondly, most of the territorial sovereignty disputes in the South China Sea are multilateral disputes involving more than two States, but China invariably insists on resolving disputes through bilateral negotiations. This strategy gives China the upper hand when dealing with smaller States. However, there is no logical basis for resolving multilateral disputes through bilateral negotiations. Perhaps China continues this

³⁷ Upon ratification of the LOSC, China made the following declaration under article 298 of the LOSC: “The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.”; See *United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter* <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

³⁸ Lee Kuan Yew, *Past key to understanding China’s territorial claims* (29 March 2014) Straits Times <<http://www.straitstimes.com/asia/south-asia/past-key-to-understanding-chinas-territorial-claims>>.

³⁹ Ian Storey, ‘The Sino-Vietnamese Oil Rig Crisis: Implications for the South China Sea Dispute’ (2014) 52 *ISEAS Perspective* 1, 4.

delaying strategy in order to strengthen its territorial sovereignty and associated maritime claims in the long term, rather than striving for peaceful, short-term dispute resolution procedures.

Thirdly, sovereignty claims over offshore features in the South China Sea are already included in the domestic laws of several littoral States. For example, the Law on the Territorial Sea and the Contiguous Zone of China states that the territorial land of China “includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People's Republic of China.”⁴⁰ The Law of the Sea of Vietnam states that “[t]his Law provides for the baseline, the internal waters, the territorial sea...the Paracel and Spratly archipelagos and other archipelagos under the sovereignty, sovereign rights and jurisdiction of Viet Nam.”⁴¹ Similarly, the 2009 Baseline Law of the Philippines affirms that the Philippines exercises sovereignty over the Kalayaan Island Group (part of the Spratly Islands) and Bajo de Masinloc (also known as Scarborough Shoal).⁴² That these States have made such explicit reference to offshore features in their domestic legislation suggests they are unlikely to compromise their sovereignty claims in any bilateral or multilateral negotiation.

Lastly, resolving sovereignty disputes over these offshore features requires not only compromise but also a strong political will from the parties involved. However, with the rise of nationalist sentiment among claimant States, particularly China, Vietnam and the Philippines, it will be difficult for the respective governments to accept

⁴⁰ Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone 1992 (effective 25 February 1992), art 2.

⁴¹ *The Law of the Sea of Vietnam*, signed on 21 June 2012 (entered into force 1 January 2013), art 1.

⁴² See section 2 of the *Republic Act No. 9522* <<http://www.gov.ph/2009/03/10/republic-act-no-9522/>>.

any proposal that results in strong domestic criticism or protest. Wu Jianmin, a former Chinese diplomatic spokesman, has highlighted the difficulties for a Chinese leader to publicly speak of compromise with China's neighbours in the South China Sea, propounding that "[y]ou would be a 'traitor.'"⁴³ Recent demonstrations in both China and the Philippines over Scarborough Shoal, and in Vietnam over the Haiyang Shiyou 981 oil rig incident, are good illustrations of the strong sense of nationalism in these particular States.⁴⁴

9.6 Existing political and strategic mistrust between States concerned

Various maritime incidents in the South China Sea, together with China's extensive artificial island-building program and its pattern of aggressive behaviour in the region, have resulted in political and strategic mistrust between China and other littoral States. The involvement of external players in the South China Sea, particularly the United States, has also added to the strategic distrust between the United States and China. While smaller littoral States of the South China Sea welcome the United States playing a constructive role in the region, they still appear to be cautious in their policies towards the United States. Indeed, the historical and cultural baggage that these States bring to the negotiating table, as well as their different political ideologies and strategic national interests, are all factors that have affected their mutual trust in the United States. The irony, however, is that high levels of trust among the major players in the South China Sea, particularly the United States, China, the Philippines and Vietnam, are critical to the stability and security of the region.

⁴³ Howard W French, *China's Dangerous Game* (29 August 2015) Atlantic <<http://www.theatlantic.com/magazine/archive/2014/11/chinas-dangerous-game/380789/>>.

⁴⁴ *Worst crisis in decades: Vietnam riots over Chinese drilling spread, killing more than 20* (15 May) Russia Today <<http://www.rt.com/news/159064-vietnam-factory-killed-rioters/>>; *Protest in Philippines over South China Sea stand-off* (11 May) BBC <<http://www.bbc.com/news/world-asia-18030805>>.

9.6.1 Vietnam-China relations

After more than a decade of hostility which began with the 1979 border conflict, Vietnam and China officially normalised their relationship in 1991. Since this time, the bilateral relationship has evolved substantially under the motto of “friendly neighbourliness, comprehensive cooperation, long-term stability and looking toward the future”. In 2008, the relationship between the two States solidified into a comprehensive strategic partnership, paving the way for future cooperative milestones.⁴⁵ In December 2000, China and Vietnam reached an agreement on maritime boundary delimitation in the Gulf of Tonkin. This agreement was the first maritime boundary agreement in the region to involve China. In October 2011, China and Vietnam signed an Agreement on Basic Principles Guiding the Settlement of Maritime-Related Issues, with the two States committing to dispute resolution procedures based on legal processes and principles defined by international law, as well as “through friendly talks and negotiations.”⁴⁶ However, numerous maritime incidents in the South China Sea between Chinese and Vietnamese vessels have revealed political and strategic mistrust between the two States. In a media interview during his visit to the Philippines in May 2014, Vietnamese Prime Minister Nguyen Tan Dung stated that “[w]hat China is doing [with the Haiyang Shiyu 981 oil rig] is totally different to what China is speaking”⁴⁷, adding that “Vietnam always wants peace and friendship on the basis of independence, self-reliance, sovereignty, [and] territorial integrity of land and sea; however, Vietnam will

⁴⁵ *Vietnam wishes China success in development cause* (20 January) Communist Party of Vietnam Online Newspaper <http://dangcongsan.vn/cpv/Modules/News_English/News_Detail_E.aspx?CN_ID=696101&CO_ID=30113>.

⁴⁶ *VN-China basic principles on settlement of sea issues* (12 October) VietnamPlus <<http://en.vietnamplus.vn/Home/VNChina-basic-principles-on-settlement-of-sea-issues/201110/21524.vnplus>>.

⁴⁷ See *Thủ tướng: 'Không đánh đổi chủ quyền lấy hữu nghị viễn vông'* (translated into English by the author) (22 May) VNExpress <<http://vnexpress.net/tin-tuc/the-gioi/thu-tuong-khong-danh-doi-chu-quyen-lay-huu-nghi-vien-vong-2994075.html>>.

never exchange this sacred sovereignty for some kind of unrealizable or dependent peace and friendship.”⁴⁸ Speaking with Chinese President Xi Jinping during his visit to Vietnam in November 2015, Vietnam’s President Truong Tan Sang expressed his concern that “the trust in the relations between the two parties, two States, among our people, officials, and party members has declined in recent years due to disputes and disagreements over maritime issues as well as the failure to fully implement a number of cooperative agreements between the two States.”⁴⁹ According to the Spring 2015 Global Attitudes survey, only 19 per cent of Vietnamese respondents had a positive view on China, while 83 per cent expressed concern about Vietnam’s territorial disputes with the economic and military superpower.⁵⁰ The 1974 Paracels battle, the 1979 border war, and the 1988 Spratlys maritime conflict have been widely reported by Vietnamese media outlets as battles stemming from China’s illegal invasions. Indeed, the perception of China as a threat *emerged* during the 2014 Haiyang Shiyu 981 oil rig incident. Since this clash the two States have tried to restore their relationship; however, it has been difficult for the two countries to regain the trust they first forged in 1991. Even though China and Vietnam share the same nominal political ideology, Vietnam’s foreign policy *vis-a-vis* China centres on protecting its sovereignty and national interests in the South China Sea. However, with China’s formidable artificial island-building program in the Spratly Islands, its growing assertiveness in the South China Sea, as well as social, political and strategic distrust, mending the strained relationship between the two States will be a difficult task.

⁴⁸ Ibid.

⁴⁹ D Ngoc, *Tranh chấp, bất đồng trên biển làm suy giảm lòng tin Việt-Trung* (Maritime disputes have deteriorate trust between Vietnam and China, in Vietnamese, translated by the author) (6 November 2015) Người Lao Động <<http://nld.com.vn/thoi-su-trong-nuoc/tranh-chap-bat-dong-tren-bien-lam-suy-giam-long-tin-viet-trung-2015110614560314.htm>>.

⁵⁰ See *How Asia-Pacific Publics See Each Other and Their National Leaders* (2 September 2015) Pew Research Center <<http://www.pewglobal.org/2015/09/02/how-asia-pacific-publics-see-each-other-and-their-national-leaders/>>.

9.6.2 Philippines-China relations

The relationship between China and the Philippines has also undergone dramatic change due to maritime disputes in the South China Sea. Indeed, since China occupied Mischief Reef in 1995, the relationship between the two States has deteriorated significantly. However, when Philippine President Arroyo came into power in 2011, the relationship between the two States improved remarkably. To mark the 30th anniversary of diplomatic relations between China and the Philippines in 2005, Chinese President Hu Jintao paid a state visit to the Philippines, with the two States affirming that “China-Philippines relations have reached the golden age of partnership.”⁵¹ Notably, in 2005 three oil companies from China, Vietnam and the Philippines signed a Tripartite Agreement for Joint Marine Seismic Undertakings in the Agreement Area in the South China Sea, with the hope of “contribut[ing] to the transformation of the South China Sea into an area of peace, stability, cooperation, and development in accordance with the 1982 United Nations Convention on the Law of the Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea.”⁵² However, the agreement was later suspended due to a widely publicised accusation by the Philippines that the agreement violated its national laws.⁵³ The relationship between China and the Philippines has certainly worsened since 2012 due to the maritime standoff over Scarborough Shoal. In 2013, the Philippines filed an arbitration case against China’s unlawful claims in the South China Sea despite formal objections from Beijing. In

⁵¹ *Joint Statement of the People's Republic of China and the Republic of the Philippines* (28 April) Embassy of the People's Republic of China in the Republic of the Philippines
<<http://ph.chineseembassy.org/eng/zfgx/zzgx/t199778.htm>>.

⁵² *Oil Companies of China, the Philippines and Vietnam signed Agreement on South China Sea Cooperation* (15 March) Embassy of the People's Republic of China in the Republic of the Philippines
<<http://ph.chineseembassy.org/eng/zt/nhwt/t187333.htm>>.

⁵³ Angelo A Jimenez, 'Philippine's Approaches to the South China Sea Disputes: International arbitration and the Challenges of a Rule-Based Regime' in Jing Huang and Andrew Billo (eds), *Territorial Disputes in the South China Sea: Navigating Rough Waters* (Palgrave Macmillan, 2015) , 106.

response, China asserted that “what the Philippine side did seriously damaged bilateral relations with China.”⁵⁴ Although China has sought to resolve maritime disputes with the Philippines through bilateral negotiations, Philippine President Aquino has made it clear that “we cannot agree to bilateral talks to solve the problem, because we think the problem is multilateral.”⁵⁵ The political mistrust between the two States has increased to such an extent that President Aquino openly expressed his misgivings over Manila’s diplomatic relations with China, exclaiming that “[a]t the end of the day, it goes from hot to cold, sometimes they’re very conciliatory, sometimes they make very provocative statements”.⁵⁶ President Aquino further conceded that “we don’t understand some of the messages [we get from China] sometimes. We’re not sure.”⁵⁷ Since 2012, the relationship between China and the Philippines has suffered significant setbacks. As Richard Heydarian has succinctly stated: “China and the Philippines have the most toxic bilateral relationship in Asia.”⁵⁸ According to a 2015 survey by the Social Weather Stations, 60 per cent of adults in the Philippines have “little trust” in China, and 51 per cent of Filipinos are concerned about maritime disputes with China in the South China Sea.⁵⁹

In May 2016, newly elected Philippine President Rodrigo Duterte indicated he wanted to cultivate friendly relations with China, and would open up direct talks with

⁵⁴ *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (12 July 2014) Ministry of Foreign Affairs of the People's Republic of China <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

⁵⁵ Quoted in Rick Gladstone, *Philippines Concerned About China, Leader Says* (23 September) New York Times <http://www.nytimes.com/2014/09/24/world/asia/philippines-president-aquino-concerned-about-china-president-says.html?_r=0>.

⁵⁶ Quoted in *ibid.*

⁵⁷ Quoted in *ibid.*

⁵⁸ Richard Javad Heydarian, *A Toxic Relation* (15 April 2016) Cipher Brief <<https://thecipherbrief.com/article/asia/toxic-relationship-1093>>.

⁵⁹ Helen Flores, *6 of 10 Pinoys have little trust in China* (10 July 2015) Philippine Star <<http://www.philstar.com/headlines/2015/07/10/1475267/6-10-pinoys-have-little-trust-china>>.

Beijing over the South China Sea territorial disputes.⁶⁰ This suggests a degree of hope that the two sides may be able to restore their relationship in the coming years. However, as the arbitral tribunal ruled in favour of the Philippines, it is unlikely that Manila will concede any of its maritime claims to China in order to re-establish closer ties.

9.6.3 United States-China relations

The lack of strategic trust between China and the United States has also deepened due to various factors. The U.S. rebalancing policy towards the Asia-Pacific to strengthen military, economic and diplomatic relationships with other Asian nations has led to China becoming increasingly suspicious of U.S. involvement in the region. Despite the United States going to great lengths to explain that the rebalancing policy is about broadening U.S. engagement with Asia-Pacific States, and not a containment exercise against China, many Chinese scholars have expressed the view that the U.S. rebalancing policy targets China.⁶¹ Fan Gaoyue, a Senior Colonel in the Chinese Army and Research Fellow at the Chinese Academy of Military Science, has expressed concerns over the United States expanding its air and navy bases and increasing its military presence in coastal regions of East Asia to monitor Chinese air and navy forces. Fan has also propounded that the “Air-Sea Battle” concept exaggerates the “China threat” in order to satisfy the U.S. domestic demand to contain China.⁶² Indeed, for Fan,

⁶⁰ Cited in *Philippines' Duterte wants friendly ties with China* (16 May 2016) Bangkok Post <<http://www.bangkokpost.com/news/asean/974109/philippines-duterte-wants-friendly-ties-with-china>>.

⁶¹ See Rong Chen, 'A Critical Analysis of the U.S. "Pivot" toward the Asia-Pacific: How Realistic is Neo-realism?' (Summer 2013) *The Quarterly Journal* 39, 43; Zhi Linfei and Ran Wei, *Yearenders: Obama administration's Asia pivot strategy sows more seeds of suspicion than cooperation* (23 December) Xinhua <http://news.xinhuanet.com/english/indepth/2011-12/23/c_131323762.htm>; see also Zhong Sheng, *Goals of US 'Return-to-Asia' strategy questioned* (18 October) People's Daily <<http://english.peopledaily.com.cn/90780/7620216.html>>.

⁶² Yu Jincui, *New US strategy brings risk of new arms race* (8 December) Global Times <<http://www.globaltimes.cn/content/687727.shtml>>.

“promoting such a concept will have a negative influence on building strategic mutual trust between China and the US, and it will result in an escalation of tensions in the Asia-Pacific region.”⁶³ Some Chinese authors have also proffered the view that the U.S. rebalancing policy is designed to force China to accept the order and norms set by the United States.⁶⁴ Regarding the Trans Pacific Partnership (TPP), at a meeting with President Obama in November 2014, Chinese President Xi Jinping affirmed that “I don’t see any of the regional free trade agreements as targeting China. China is committed to open regionalism and we believe the various regional cooperation initiatives should positively interact with each other. That is currently the case.”⁶⁵ However, many Chinese observers have argued that the TPP is an instrument that the United States is using to strengthen its economic control in the region and to contain China.⁶⁶ For example, Yin Chengde, a Research Fellow at the China Foundation for International Studies, has explained that “[by] involving its Asian allies Japan and Vietnam, both of which have territorial disputes with China, in the TPP, the United States obviously hopes to form a united front against China.”⁶⁷

In relation to the South China Sea, while the United States has asserted that it “will not accept restrictions on freedom of navigation and overflight, or other lawful uses of the sea”⁶⁸, China has rejected U.S. concerns over the issue. Speaking at the

⁶³ Quoted in *ibid.*

⁶⁴ Yang Yi and Zhao Quinghai, ‘The “Indo-Pacific” Concept: Implications for China’ in Mohan Malik (ed), *Maritime Security in the Indo-Pacific: Perspectives from China, India, and the United States* (Rowman & Littlefield, 2014) , 76.

⁶⁵ Quoted in Matt Spetalnick and Michael Martina, *U.S., China sign symbolic emissions plan, play down rivalry* (12 November) Reuters <<http://www.reuters.com/article/2014/11/12/us-china-usa-idUSKCN0IW08320141112>>.

⁶⁶ Michael D Swaine, ‘Chinese Leadership and Elite Responses to the U.S. Pacific Pivot’ (2012) (38) *China Leadership Monitor* 1, 11.

⁶⁷ Yin Chengde, *Politicizing the TPP* (12 August 2015) China and US Focus <<http://www.chinausfocus.com/finance-economy/politicizing-the-tpp/>>.

⁶⁸ Quoted in *South China Sea dispute: John Kerry says US will not accept restrictions on movements in the sea* (7 August 2015) ABC <<http://www.abc.net.au/news/2015-08-06/kerry-says-us-will-not-accept-restrictions-in-south-china-sea/6679060>>.

ASEAN Regional Forum in August 2015, Chinese Foreign Minister Wang Yi ventured as far as to say that “China always maintains that countries enjoy freedom of navigation and overflight in the South China Sea in accordance with the international law. Up to now, there has not been a single case in which freedom of navigation in the South China Sea is impeded.”⁶⁹ While the United States supports the resolution of South China Sea disputes multilaterally, China prefers direct bilateral negotiation between the States concerned. The United States has repeatedly stated its support for a Code of Conduct, but China invariably seeks to exclude the United States from regional conversations. According to Shannon Tiezzi, China “will not move forward on a code of conduct until the U.S. butts out.”⁷⁰ Speaking at the Shangri La Dialogue 2016 in Singapore, Ashton Carter, U.S. Secretary of Defense, expressed the view that “in the South China Sea, China has taken some expansive and unprecedented actions that have generated concerns about China’s strategic intentions”, adding that “if these actions continue, China could end up erecting a Great Wall of self-isolation.”⁷¹ In response to Carter’s comments, Admiral Sun Jianguo, Deputy Chief of General Staff of the People’s Liberation Army, stated that “[a]ctually I am worried that some people and countries are still looking at China with the Cold War mentality and prejudice. They may build a wall in their minds and end up isolating themselves.”⁷² Carter and Sun have expressed

⁶⁹ Wang Yi on the South China Sea Issue At the ASEAN Regional Forum (06 August 2015) Ministry of Foreign Affairs of the People’s Republic of China

<http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1287277.shtml>.

⁷⁰ Shannon Tiezzi, *Why China Isn’t Interested in a South China Sea Code of Conduct* (26 February 2014) The Diplomat <<http://thediplomat.com/2014/02/why-china-isnt-interested-in-a-south-china-sea-code-of-conduct/>>.

⁷¹ Ashton Carter, *Meeting Asia’s Complex Security Challenges* (04 June 2016) International Institute for Strategic Studies <<https://www.iiss.org/en/events/shangri%20la%20dialogue/archive/shangri-la-dialogue-2016-4a4b/plenary1-ab09/carter-1610>>.

⁷² Lee Seok Hwai, *5 highlights of Shangri-La Dialogue 2016* (6 June 2016) The Straits Times <<http://www.straitstimes.com/asia/se-asia/5-highlights-of-shangri-la-dialogue-2016>>.

diametrically opposing views, their comments clearly revealing the depth of the strategic mistrust between the two powers.

9.6.4 United States relations with The Philippines and Vietnam

While the South China Sea disputes have pushed Vietnam and the Philippines closer to the United States, political and strategic trust between the United States and these two small South China Sea claimants is not always high.

Over the past decade there has been an improvement in the relationship between Vietnam and the United States. However, due to historical issues and different political ideologies, the two States still have a lot of work to do to fully normalise their relationship. While human rights and democratic governance are the two major areas of concern for the United States in its foreign policy towards Vietnam, maintaining the power of the Vietnamese regime, preventing U.S.-led “peaceful evolution”, and creating breathing space between U.S.-China strategic and diplomatic manoeuvres are key concerns for Vietnam’s foreign policy towards the United States. Moreover, Vietnam is unlikely to forget the 1974 Paracels battle with China – a battle which, in Vietnamese consciousness, saw the United States give the green light to China to invade Vietnam. In this regard, Nguyen Manh Ha, Director of the Institute of Party History of Vietnam’s Communist Party, has declared that:

Without the handshake between Mao Zedong and Nixon, China would have not dared to occupy the Paracel Islands, which was controlled by the southern government. America was behind the southern region but why they did not support the southern

government? It is because the US-China interests at that time were much bigger than the “southern government card.”⁷³

Vietnam thus understands that national interests, rather than alliances, dictate State relations. Vietnam also understands that the South China Sea issue is not the central strategic factor in China-U.S. relations. Even though the relationship between Vietnam and the United States has improved dramatically in recent years, it is unlikely that Vietnam will seek a security alliance with the United States.

Although the Philippines and the United States are treaty allies, the level of trust between these two States is not always high. Indeed, the strategic importance of the alliance declined after 1991, when the Philippine Government voted to put an end to U.S. military bases in the Philippines. The withdrawal of U.S. forces created a power vacuum in the region, giving China the perfect opportunity to seize Mischief Reef in 1995. During the 2012 Scarborough Shoal standoff between China and the Philippines, the United States did show support for the Philippines by pressing China for a peaceful resolution. However, in the end, the Philippines lost control of the shoal to Chinese forces. With the growing assertiveness of China, the relationship between the United States and the Philippines has improved in recent years. The 2014 Philippines-U.S. Enhanced Defense Cooperation Agreement is an example of strategic trust being rebuilt between the two States. However, as Aileen Baviera has commented, “while most Filipinos welcome cooperation with the United States, many remain distrustful of unequal agreement that long characterized relations with the former colonizer.”⁷⁴

⁷³ Quoted in *Why China invaded Vietnam's Gac Ma Reef in 1988* (17 March 2016) Vietnamnet <<http://english.vietnamnet.vn/fms/special-reports/152634/why-china-invaded-vietnam-s-gac-ma-reef-in-1988.html>>.

⁷⁴ Aileen S P Baviera, *Implications of the US-Philippines Enhanced Defense Cooperation Agreement* (9 May 2014) East-West Center <<http://www.eastwestcenter.org/system/tdf/private/apb262.pdf?file=1&type=node&id=34570>>.

9.7 Implications for the future security, safety and freedom of navigation and overflight

While most littoral States of the South China Sea have tried to enact domestic legislation which is consistent with the LOSC, China, on the other hand, has claimed almost all the waters of the South China Sea in contravention of international law. In addition, China has advanced the most restrictive view on the freedoms of navigation and overflight in various maritime zones, and assumed an aggressive posture in defending its excessive territorial sovereignty and maritime claims in the region. According to Peter Dutton, as a rising maritime power China appears to employ power-based approaches in pursuing its maritime interests rather than law-based options.⁷⁵ Dutton has also noted that “[a]t no time in the last six decades can it be said that China’s preferred approach to achieving its peripheral maritime aims has been through international law.”⁷⁶

Maintaining the security, safety and freedom of navigation and overflight in the South China Sea is in the interest of not only littoral States but also extra-regional players. Therefore, the States concerned need to cooperate with each other to diffuse tensions and reduce the potential for violent clashes in this strategically important region. With the aim of seeing the “China Dream” become a reality, China has increased its defence spending and is fiercely protecting its territorial sovereignty and maritime claims in the South China Sea. In his speech to soldiers in the city of Huizhou in 2012, Chinese President Xi Jinping emphasised the military aspects of the “Chinese Dream”, declaring that “[t]his dream can be said to be the dream of a strong nation; and

⁷⁵ Peter Dutton, 'Viribus mari Victoria? Power and Law in the South China Sea' (Paper presented at the Managing Tensions in the South China Sea Conference, CSIS, 5-6 June 2013),4.

⁷⁶ Ibid.

for the military, it is the dream of a strong military.”⁷⁷ In May 2015, the Chinese government released its Defence White Paper (DWP) titled “China’s Military Strategy.” The paper is significant in that it highlights the role of China’s military strategy in securing the South China Sea domain. The DWP clearly states that “[t]he traditional mentality that land outweighs sea must be abandoned and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interests.”⁷⁸ The paper also notes that the Chinese navy “will gradually shift its focus from ‘offshore waters defense’ to the combination of ‘offshore waters defense’ with ‘open seas protection.’”⁷⁹ Regarding territorial sovereignty and maritime disputes in the South China Sea, the DWP asserts that some of China’s neighbours “take provocative actions and reinforce their military presence on China’s reefs and islands that they have illegally occupied”⁸⁰, and that “[s]ome external countries are also busy meddling in the South China Sea affairs.”⁸¹ It is clearly evident from these comments that China will not compromise its territorial sovereignty and maritime claims in the South China Sea. Nor will it submit to any legal process or entertain the involvement of external players in managing South China Sea affairs.

As China has landed a number of aircraft on disputed features in the Spratly Islands, it would appear that basing Chinese military aircraft on these artificial islands will inevitably follow.⁸² Philippine Foreign Ministry spokesman Charles Jose has surmised that “[t]hat’s the fear, that China will be able to take control of the South China

⁷⁷ Edward Wong, *China’s Communist Party Chief Acts to Bolster Military* (14 December 2012) New York Times <http://www.nytimes.com/2012/12/15/world/asia/chinas-xi-jinping-acts-to-bolster-military.html?_r=0>.

⁷⁸ See *Full Text: China’s Military Strategy* (26 May 2015) Xinhuanet <http://news.xinhuanet.com/english/china/2015-05/26/c_134271001_4.htm>.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² *China lands more civilian planes on Fiery Cross reef* (7 January 2016) BBC NEWS <<http://www.bbc.com/news/world-asia-china-35249092>>.

Sea and it will affect the freedom of navigation and freedom of overflight.”⁸³ According to Richard Fisher, it is to be expected that China will deploy surface-to-air missiles to islands in the Spratlys.⁸⁴ If this occurs, then increasing its military presence in both the Paracels and the Spratlys could help China effectively establish an air defence identification zone (ADIZ) in the South China Sea. In November 2013, China declared an ADIZ in the East China Sea, sparking concerns from regional States, including the United States, Japan and Australia.⁸⁵ An ADIZ is a designated “area of airspace over land or water, extending upward from the surface, within which the ready identification, the location, and the control of aircraft are required in the interest of national security.”⁸⁶ The ADIZ concept is not clearly addressed in international law, but many States in the region including the United States, Japan, South Korea and Taiwan have established ADIZs. China’s ADIZ in the East China Sea covers airspace over disputed territories, notably the Senkaku/Diaoyu Islands and overlaps with the ADIZs of Japan, South Korea and Taiwan. Moreover, unlike the ADIZs of other States, China requests all foreign aircraft, including civilian and military aircraft crossing its ADIZ, to identify themselves and to follow Chinese instructions on flight paths even though such aircraft are not entering Chinese airspace.⁸⁷ If China establishes an ADIZ in the South China Sea, then this will definitely have a negative effect on the passage of sovereign immune aircraft. Moreover, if an ADIZ does transpire, then it is likely that there will be more

⁸³ Quoted in *South China Sea tensions surge as China lands plane on artificial island* (4 January 2016) CNBC <<http://www.cnbc.com/2016/01/04/south-china-sea-tensions-surge-as-china-lands-plane-on-artificial-island.html>>.

⁸⁴ Cited in William Lowther, *China deploying missiles in Paracels* (18 February 2016) Taipei Times <<http://www.taipetimes.com/News/front/archives/2016/02/18/2003639615>>.

⁸⁵ Rory Medcalf, 'What's wrong with China's Air Defence Identification Zone (and what's not)' (The Interpreter, 27 November 2013) <[http://www.lowyinterpreter.org/post/2013/11/27/Whats-wrong-with-Chinas-Air-Defence-Identification-Zone-\(and-whats-not\).aspx](http://www.lowyinterpreter.org/post/2013/11/27/Whats-wrong-with-Chinas-Air-Defence-Identification-Zone-(and-whats-not).aspx)>.

⁸⁶ *Aeronautical Information Manual: Official Guide to Basic Flight Information and ATC Procedures* (U.S. Department of Transportation, Federal Aviation Administration 2015), PCG A-4.

⁸⁷ See Text of ECS ADIZ Announcement in Ian E Rinehart and Bart Elias, 'China's Air Defense Identification Zone (ADIZ)' (Congressional Research Service, 30 January 2015), 40.

Chinese military aircraft patrolling the airspace above the South China Sea. Accordingly, intentional and unintentional aviation incidents will be difficult to avoid.

On the ocean surface, China will continue to adhere to its restrictive views on the innocent passage of foreign warships in the territorial sea and foreign military activities in the EEZ. With its increasing maritime power, it is expected that China will be more assertive and aggressive in defending its position regarding these issues.

In addition to increasing the presence of its military and law enforcement vessels, China has been operating the world's largest fleet of fishing vessels, with many of these vessels being used as maritime militia to enforce China's maritime claims in the South China Sea.⁸⁸ Indeed, approximately 200,000 fishing vessels comprise China's maritime militia, with such vessels supporting China's coercive maritime claims against other claimant States in the South China Sea and East China Sea.⁸⁹ As a number of Chinese fishing vessels have been trained to confront foreign vessels in disputed waters, incidents involving these fishing vessels and other sovereign immune vessels operating in the South China Sea will continue to take place.

In light of the above discussion, China's military ambitions, combined with its increasing maritime forces and pattern of aggressive behaviour over the past few decades, will make the task of maintaining the security, safety and freedom of navigation and overflight in the South China Sea in the coming years very challenging.

9.8 The way forward

In order to avoid both intentional and unintentional maritime incidents in the South China Sea, there are a number of recommendations that the relevant States should consider.

⁸⁸ James Kraska and Michael Monti, 'The Law of Naval Warfare and China's Maritime Militia' (2015) 91 *International Law studies* 450, 451.

⁸⁹ *Ibid.*

Firstly, pending the resolution of their territorial sovereignty and maritime claims, the States concerned could maintain the current status quo in the South China Sea, including in disputed offshore territories. This would require the relevant States to not only halt island building, but also refrain from sending additional naval and law enforcement assets to disputed maritime areas for the purpose of asserting sovereignty claims. This option was mentioned in the Declaration on the Conduct of Parties in the South China Sea (DOC), and has also been suggested by many diplomatic and political leaders.⁹⁰ However, China might not be interested in this option, as it views the current status quo as unfavourable. Nevertheless, ASEAN member States could work with China to implement the DOC while refraining from any action which would complicate or escalate existing disputes. Extra-regional powers, particularly the United States, Japan, India and Australia, could also play an important role in maintaining the existing state of affairs in the South China Sea, thus hampering China's plans to consolidate its presence and alter the status quo in the region in its favour. In order to support the role of extra-regional powers (particularly the United States) in maintaining the freedoms of navigation and overflight in the region, littoral States could issue a joint statement expressing their views on the innocent passage of foreign warships in the territorial sea and foreign military activities in the EEZ – views which are consistent with customary international law and the LOSC. It is worth noting that despite Vietnam's domestic law requiring prior notification for the passage of foreign warships in its territorial sea, the passage of the USS *Curtis Wilbur* within 12 nautical miles of Triton Island claimed by

⁹⁰ See *Declaration on the Conduct of Parties in the South China Sea* (4 November 2002) Association of Southeast Asian Nations, <<http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>>; John Boudreau and Phil Mattingly, *Vietnam Premier Calls for South China Sea Restraint* (13 November 2014) Bloomberg <<http://www.bloomberg.com/news/articles/2014-11-13/obama-says-u-s-and-vietnam-experiencing-deeper-engagement->>; Andrew Chubb, *The South China Sea: Defining the 'Status Quo'* (11 June 2015) The Diplomat <<http://thediplomat.com/2015/06/the-south-china-sea-defining-the-status-quo/>>.

Vietnam (among other States), without any prior notification being given prompted Vietnamese Foreign Ministry spokesman Le Hai Binh to state that: “Vietnam respects the right of innocent passage through its territory in accordance with international law, particularly Article 17 of the Law of the Sea Convention.”⁹¹

Secondly, a Code of Conduct (Code) for the South China Sea seems difficult to achieve due to the different interests of China and ASEAN States. China does not want to have a legally binding document with ASEAN in the South China Sea, while a number of ASEAN States including Cambodia, Laos, Thailand and Myanmar may not be in a hurry to push for a Code which would impact their relationship with China. According to Carl Thayer, “the geographical area of ASEAN’s proposed CoC cannot be defined until China either clarifies or withdraws its nine-dash line claim to the South China Sea.”⁹² Thayer has also added that “because ASEAN and China have agreed to proceed with consultations on the drafting of a CoC on the basis of consensus, China can delay these proceedings indefinitely.”⁹³ As mentioned in Chapter eight, China and the ASEAN aimed to reach a framework for a code of conduct for the South China Sea by the middle of 2017. As ASEAN is unlikely to strike an agreement with China on South China Sea issues, other littoral States could strive for an incidents at sea agreement that sets out rules of behaviour for when their sovereign immune vessels and aircraft encounter each other. Such an agreement could then be opened to other interested States, including Indonesia, Singapore, the United States, Japan, India and Australia. If such an agreement were to receive wide support from the regional

⁹¹ Quoted in Viet Anh, *Vietnam Respects Innocent Passage of U.S Ship in the Paracel Islands* (31 January 2016) Vnexpress <<http://vnexpress.net/tin-tuc/the-gioi/viet-nam-ton-trong-quyen-di-qua-vo-hai-cua-tau-my-o-hoang-sa-3350816.html>>.

⁹² Carlyle A Thayer, *Indirect Cost Imposition Strategies in the South China Sea: U.S. Leadership and ASEAN Centrality*, Maritime Strategy Series (Center for New American Security, 2015), 11.

⁹³ Ibid, 10.

community and extra-regional players, it would not only help avoid maritime incidents but also potentially reduce the aggressive behaviour of Chinese maritime forces in the region. Based on the arbitral tribunal's ruling, South China Sea claimants could strive for a joint understanding or joint declaration to support the ruling regarding the nine-dash line and the status of land features in the South China Sea. If all relevant States showed support for the arbitral tribunal's decision that the nine-dash line claimed by China has no legal basis, and that all land features in the South China Sea are incapable of generating EEZs or continental shelves, this would help not only narrow down the disputed maritime areas in this region, but also demonstrate respect for the LOSC.

Thirdly, as most of the recent maritime incidents in the South China Sea have involved law enforcement vessels rather than naval ships and aircraft, regional States could establish a law enforcement forum and develop maritime safety guidelines or agreements between regional maritime law enforcement forces. The North Pacific Coast Guard Forum (NPCF) established in 2000 is a good example of this practice. The NPCF currently consists of six members, China, Canada, Japan, South Korea, Russia and the United States. The focus areas of the NPCF include maritime security, maritime domain awareness, illegal drug trafficking, illegal migration, fisheries enforcement, and combined operations.⁹⁴ Since the forum was established, a number of bilateral and multilateral operations and exercises have been conducted.⁹⁵ Also, the Heads of Asian Coast Guard Agencies Meeting (HACGAM) has been held almost every year since 2004. Representatives from Asian States, including all South China Sea littoral States, have participated in "active discussions on their shared challenges concerning piracy

⁹⁴ See *North Pacific Coast Guard Forum* (24 June 2013) Canadian Coast Guard <<http://www.ccg-gcc.gc.ca/e0007869>>.

⁹⁵ Michael Arguelles, 'In the Spirit of Cooperation: the North Pacific Coast Guard Forum' (Spring 2014) *Coast Guard Proceedings* 28, 29.

and proposed a general framework of collaboration to effectively deal with this issue.”⁹⁶

It is recommended that HACGAM develop mechanisms for coast guard-type maritime forces, including but not limited to, coast guards, fisheries enforcement agencies and marine police, which could then cooperate at an operational level and also establish guiding principles for the safe interaction of these types of maritime forces. If such guiding principles are established and consistently implemented by a majority of States in the region, they could certainly lead to the formation of customary international law principles which would become binding on all States over time. In addition, the Taiwan Coast Guard should be invited to participate in this regional law enforcement effort – not as a State but as an *agency* in a similar way to the way Taiwan participates in the Asia-Pacific Economic Cooperation (APEC) group and the Western and Central Pacific Fisheries Commission (WCPFC). This will help avoid sovereignty issues and improve the effectiveness of any regional resolution regarding the passage of coast guard-type maritime forces in the South China Sea. If these guiding principles are not established in the near future, hotlines between coast guard-type maritime forces could be set up to help prevent small-scale incidents from escalating into large-scale conflict.

Fourthly, pending the resolution of territorial sovereignty disputes and maritime claims, regional States could cooperate to increase maritime situational awareness, thus avoiding mistakes and miscalculations. Established in 2009, the Singapore-based Information Fusion Centre (IFC) is a Singaporean initiative which seeks to strengthen regional maritime security “by building a common coherent maritime situation picture and acting as a maritime information hub for the region.”⁹⁷ The IFC shares information

⁹⁶ *The 10th Heads of Asian Coast Guard Agencies Meeting* (30 September 2014) Nippon Foundation <<http://www.nippon-foundation.or.jp/en/who/message/speeches/2014/7.html>>.

⁹⁷ Nicholas Lim, 'The Information Fusion Centre (IFC) -A Case for Information Sharing to Enforce Security in the Maritime Domain.' (April 2011) *Pointer: Journal of the Singapore Armed Forces* 3, 6.

with members of the Western Pacific Naval Symposium (WPNS) through the Regional Maritime Information Exchange (ReMIX) System.⁹⁸ However, this centre focuses mainly on the exchange of information regarding maritime piracy and armed robberies. Even if the centre was equipped to exchange other types of information, States would still be reluctant to share sensitive data, such as information relating to manoeuvring military vessels and aircraft. The idea of combined maritime surveillance patrols in the South China Sea by South China Sea littoral States, or by littoral States and extra-regional powers, could not only be used to improve maritime situational awareness but also strengthen regional maritime cooperation and understanding. For example, Vietnam and Malaysia could conduct combined maritime surveillance patrols within their respective EEZs, including in the overlapping areas. The United States could conduct maritime surveillance in conjunction with Vietnam and the Philippines within the EEZs of Vietnam and the Philippines. This would help build confidence between the parties and also place pressure on China in relation to its claimed nine-dash line. Importantly, all information regarding the building of artificial islands or actions which change the status quo could be publically broadcasted, thus allowing the relevant parties to take appropriate and prompt action.

Fifthly, even though there have been no incidents in the South China Sea between Chinese sovereign immune aircraft and those of smaller littoral States, the increasing number of military and coast guard aircraft in the region could pose a potential risk in the coming years. In 2015, China repeatedly warned Philippine and

⁹⁸ Paul Sinclair, 'The Search for Maritime Security in the Asia Pacific: Some Important Questions.' (2013) 13 *CSS Strategic Background Paper* 1, 6.

U.S. surveillance aircraft to leave the Spratly Island area.⁹⁹ If China continues to send its aircraft to accost or intercept surveillance aircraft of other States in the South China Sea, then potential air incidents cannot be ignored in any future regulatory regime. Currently, international law is silent on the interaction between sovereign immune aircraft outside national airspace. For this reason, South China Sea littoral States should devise a set of guiding principles for the passage of this type of aircraft. Indeed, such principles would help avoid unexpected incidents in the South China Sea, particularly in disputed maritime areas.

Sixthly, South China Sea littoral States have increased their submarine forces in recent years. However, certain States, particularly Vietnam, Indonesia and Malaysia, have little experience in handling submarines. According to Roger Thornhill, “it takes decades of submarine service to develop the tactics, techniques, procedures and doctrine, backed by experience, to be effective.”¹⁰⁰ Therefore, the safety of submarine operations in the South China Sea is a serious issue. As discussed above, the covert nature of submarine operations means that a regional agreement governing the manoeuvre of such vessels is a daunting task. NATO has a Submarine Movement Advisory Authority to manage water space and de-conflict undersea transits and operations among Allied nations and partners.¹⁰¹ However, this model cannot be replicated in the South China Sea as no single State is willing to let other States know where their submarines operate. As anti-submarine weapons can be very dangerous, this

⁹⁹ Camille Diola, *China warning Philippine planes over South China Sea* (25 May 2015) Philstar <<http://www.philstar.com/headlines/2015/05/25/1458645/china-warning-philippine-planes-over-south-china-sea>>.

¹⁰⁰ Roger Thornhill, 'Modern Under Sea Warfare' (2007) 69(4) *The Navy* 24, 24.

¹⁰¹ Dave Benham, 'An Insider's Look at NATO Submarine Forces, and the Admiral Who Commands Them.' (2015) Winter/Spring 2015(57) *Under Sea Warfare* 4, 5-7.

often results in States adopting an “all or nothing” approach.¹⁰² It would be advisable to have regional guidelines or principles in place which prevent lethal force being used when dealing with unidentified submarines detected in the territorial sea and disputed waters.¹⁰³ Another option would be to increase regional cooperation in submarine safety training and submarine rescue. This would not only help reduce the risk of submarine accidents, but also foster trust and understanding between regional submarine forces. The Submarine Escape and Rescue exercise conducted in 2010 by the navies of Singapore, Australia, Japan, South Korea, and the United States, and the Submarine Rescue Arrangement signed by the Singapore Navy and the Australian Navy in 2013, are good models for regional cooperation in submarine training and rescue.¹⁰⁴

Seventhly, as territorial sovereignty and maritime delimitation disputes in the South China Sea are unlikely to be resolved in the near future (or at all), concerned States could look for options that avoid the issues of sovereignty and maritime boundaries altogether. For example, for the safety of navigation and overflight in the region, concerned States could negotiate standard procedures for the safe interaction of sovereign immune vessels and aircraft at sea *in general*, without referring to maritime zones. This change of mind-set could help avoid the obstacle of sovereignty disputes among concerned States.

Lastly, maintaining safety, security and freedom of navigation and overflight in the South China Sea is in the interest of not only littoral States but the region as a

¹⁰² As noted by Sam Bateman, it is not possible for a submarine to use minimum force when it fires torpedo; see Sam Bateman, 'Perils of the Deep: The Dangers of Submarine Proliferation in the Seas of East Asia' (2011) 7(1) *Asian Security* 61,74.

¹⁰³ Sam Bateman, *The perils of submarine operations* (10 April 2015) Australian Strategic Policy Institute <<http://www.aspistrategist.org.au/the-perils-of-submarine-operations-2/>>.

¹⁰⁴ See *Singapore Hosts Regional Submarine Rescue Exercise* (18 August 2010) Singapore Ministry of Defense <http://www.mindef.gov.sg/imindef/press_room/official_releases/nr/2010/aug/18aug10_nr2.html#.VeEbr6N--74>; see also *Navies sign Submarine Rescue Arrangement* (15 May 2013) Royal Australian Navy <<http://www.navy.gov.au/news/navies-sign-submarine-rescue-arrangement>>.

whole. Extra-regional powers can play a constructive role in preserving the freedom of navigation and overflight in accordance with international law, thus ensuring the peace, security and stability of the area. All regional States should cooperate with each other to promote rule-based approaches to the South China Sea disputes. As Dutton has proclaimed: “Not history, not power, but international law must be the standard.”¹⁰⁵ Apart from statements urging claimants to adhere to international law and maintain the status quo in the South China Sea, peaceful naval operations to assert the freedom of navigation and overflight should be regularly conducted. Combined maritime patrols and surveillance by extra-regional maritime powers in the South China Sea will also help demonstrate their concerns over the security and freedom of navigation in this strategically important region. The patrol of the USS *Lassen* within 12 nautical miles of the artificial island built by China on Subi Reef on 27 October 2015, and the passage of the USS *Curtis Wilbur* within 12 nautical miles of Triton Island in February 2016, represent efforts by the United States to maintain the status quo in relation to the freedom of navigation in the South China Sea. However, the patrol by a single State is not powerful enough in representing State practice, and even this would make the issue become the matter between the United States and China. Therefore, combined patrol by like-minded States should be encouraged. With the ruling of the arbitral tribunal in the Philippines-China arbitration, China cannot continue to assert ambiguous maritime claims in the South China Sea. Indeed, in the wake of this ruling, the United States, Japan, India and Australia have a clear legal basis to conduct freedom of navigation operations in the South China Sea, and thus support a rules-based order. Extra-regional powers could also help smaller South China Sea States improve their knowledge and

¹⁰⁵ Dutton, above n 75, 10.

skills in handling maritime assets in accordance with international law, thus helping to mitigate maritime incidents and accidents at sea. Moreover, the United States could accede to the LOSC in order to improve its credibility and bolster its efforts in advocating for rule-based orders, not only in the region but around the world. As U.S. President Barack Obama has noted: “[We] can’t try to resolve problems in the South China Sea when we have refused to make sure that the Law of the Sea Convention is ratified by our United States Senate.”¹⁰⁶

9.9 Conclusion

The international law of the sea has played an important role in maintaining maritime safety and security. However, due to uncertain issues in the international legal regime, States continue to adopt differing interpretations of pertinent provisions to suit their own vested interests. Given China’s rise in economic and military power, as well as its pattern of aggressive behaviour, it is unlikely that it will show any respect for international legal provisions which it considers prejudicial to its own interests. By all accounts, it seems likely that China will soon declare an ADIZ in the South China Sea.¹⁰⁷ If this transpires, managing maritime safety and the freedom of navigation and overflight in the region will be a critical issue for years to come. Although there have been a number of regional initiatives to address South China Sea issues, they have had limited success. Furthermore, considerable challenges remain which necessitate swift and decisive action. The recommendations discussed in this chapter can be combined

¹⁰⁶ *Remarks by the President at the United States Military Academy Commencement Ceremony* (28 May 2014) White House <<https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony>>.

¹⁰⁷ China already established an ADIZ in the East China Sea. China also officially rejected the South China Sea arbitral tribunal award. As a rising economic and military power and with an attempt to control the South China Sea, China may establish an ADIZ in this region.

with other policies and strategies which address sovereignty disputes and maritime claims in order to keep the South China Sea peaceful and secure long into the future.

10 CONCLUSION

10.1 Introduction

This thesis has shown that the passage of sovereign immune vessels and aircraft at sea is not explicitly addressed in international law. Moreover, the geographical and geopolitical complexity of the South China Sea means that many more incidents involving vessels and aircraft of this type are likely to occur in the coming years.

The research presented in the thesis has analysed navigational issues in the South China Sea, focusing on the passage of sovereign immune vessels and aircraft. Particular attention has been given to the prevailing international law; geopolitical issues; territorial sovereignty disputes and associated maritime claims; the practices of littoral States; current regional initiatives; and the strengths and weaknesses of regional institutions. In doing so, the thesis has highlighted the challenges that lay ahead; the implications of these challenges for future maritime security, safety, and the freedom of navigation and overflight in the South China Sea; as well as a number of recommendations for more responsible navigational regimes in relation to sovereign immune vessels and aircraft in the region.

This chapter summarises the key findings of the thesis. Furthermore, based on these key findings, the chapter recommends a number of areas that require further research.

10.2 Key findings and policy recommendations

The thesis has uncovered a number of problems that continue to impact the passage of sovereign immune vessels and aircraft in the South China Sea. These problems include unresolved maritime territorial disputes and sovereignty issues; gaps and ambiguities in the international legal regime which lead to conflicting interpretations of pertinent provisions by States; limitations in the practical application

of regional initiatives at both the governmental level (Track I) and non-governmental level (Track II); differences of opinion within the Association of Southeast Asian Nations (ASEAN) over how to best approach the South China Sea disputes; China's growing assertiveness in relation to its excessive sovereignty and maritime claims in the region; and the existing political and strategic distrust among littoral States and between littoral States and extra-regional powers.

The thesis has also found that the resolution of sovereignty disputes in the South China Sea is highly unlikely in the coming years. The main reason for this is that none of the claimant States are willing to relinquish or compromise their sovereignty claims over offshore features. Furthermore, certain claimants, such as China, have taken the bold step of claiming *all* these islands, thus casting further doubt on the possibility of a resolution. Moreover, China's "nine-dash line" claim, which contravenes international law, has created an obstacle for any joint resource development in the region. Indeed, as States have not been able to agree on what areas are in dispute, they cannot agree on areas for joint resource development.

The analysis in the preceding chapters has focused on a number of regional initiatives (at both Track I and Track II levels) to promote confidence-building and prevent maritime conflict. However, current efforts to manage such conflicts appear to have had limited success. While most of the regional initiatives and bilateral agreements approved at Track I level are non-legally binding, proposals at Track II level have failed to gain traction with concerned States, as any attempt to interpret the provisions of the LOSC narrowly and with a regional focus has proved unsuccessful. ASEAN could play a central role in maintaining stable maritime security and freedom of navigation in the region. However, all ten member States of ASEAN have different stakes in, and concerns over, South China Sea issues. As a result, ASEAN has not been able to speak

with one voice in relation to the South China Sea disputes. Moreover, as consultation and consensus are the basic principles of decision-making within ASEAN, one pro-Beijing member can effectively block the organisation's decision-making process.

In addition to the shortcomings of regional mechanisms, the thesis has revealed gaps and ambiguities in international law, particularly in the way the United Nations Convention on the Law of the Sea (LOSC), the Convention on International Civil Aviation (Chicago Convention), and the International Regulations for Preventing Collisions at Sea (COLREGs) regulate the passage of sovereign immune vessels and aircraft at sea. Unfortunately, it is unlikely that these gaps and ambiguities will be resolved, as they are the inevitable product of a compromise-based international law system.

A key emphasis of the thesis has been China's burgeoning economic and military prowess. Indeed, China's advancement in these crucial areas has allowed it to disregard international law, particularly the LOSC. For example, while China applies a restrictive view on the freedom of navigation and overflight in its own EEZ, it continues to disregard the sovereign rights of other South China Sea littoral States in their respective EEZs. Granted, the LOSC contains provisions regarding foreign military activities in the EEZ of coastal States which are, at best, ambiguous. And undoubtedly China has exploited these ambiguities to its advantage. However, no ambiguity exists in the LOSC in relation to the sovereign rights enjoyed by coastal States over both living and non-living resources in their EEZs. China's legally untenable 'nine-dash line' claim, and its extensive artificial island-building program on various disputed offshore features in the South China Sea, have created concerns which transcend the safety and freedom of navigation in the South China Sea. With China's current pattern of behaviour, maintaining the safety and freedom of navigation and overflight in the South

China Sea, particularly for sovereign immune vessels and aircraft, will be a challenging issue for years to come.

The thesis has found that other maritime user States, particularly the United States, Japan, India and Australia, have interests in the South China Sea. Promoting the freedom of navigation in accordance with international law, and maintaining stable security in the South China Sea, are key priorities for these States. However, the South China Sea is not the only factor in their relations *vis-à-vis* China.

The analysis has also highlighted that as long as strategic and political distrust exists between China and other South China Sea claimants, any resolution of the South China Sea disputes will remain illusory. The strategic distrust between China and the United States also prevents external players from promoting the safety and freedom of navigation and overflight in and above the South China Sea. As a result, regional responses to maritime disputes in the South China Sea have taken on a distinct material character, with concerned States modernising their maritime forces, including navies, as well as coast guards and other types of civilian law enforcement agencies. The heightened presence of sovereign immune vessels and aircraft will increase the likelihood of adverse incidents.

The thesis has provided a number of policy recommendations to maintain the freedoms of navigation and overflight in the South China Sea, and to prevent potentially adverse incidents in the region involving the passage of sovereign immune vessels and aircraft. These recommendations include promoting regional efforts to maintain the status quo; an incidents at sea agreement between South China Sea claimant States in a way that encourages non-claimants and extra-regional powers to accede to it; encouraging South China Sea claimants to revise their maritime claims in accordance with developments in international law (such the recent award of the arbitral tribunal);

encouraging Taiwan, in its capacity as a South China Sea claimant, to play a more constructive role in the region; advocating for regional guidelines or agreements regarding the interaction between coast guard-type maritime forces in the South China Sea; promoting a regional agreement governing the interaction between State aircraft in international airspace; recommending prospective measures for the safe operation of submarines; increasing maritime awareness; and insisting that extra-regional powers play constructive roles in maintaining security and the freedom of navigation and overflight in the area. These recommendations should be combined with other relevant policies and strategies, and adapted or modified (as necessary) in accordance with the political will of the States concerned. By doing so, it is hoped that the peace, stability and security of the South China Sea will be maintained for the benefit of the region as a whole.

More than 30 years have passed since the LOSC was negotiated, and with changes in technology and the security environment, it is timely to consider what revisions may be made to the document with the support of the global community. In this regard, provisions of the LOSC related to maritime safety and the freedoms of navigation and overflight should be revised for increased clarity. However, it is highly dubious that such a proposal would help fill the gaps and ambiguities in areas relevant to the passage of sovereign immune vessels and aircraft. This is because maritime user States are unlikely to reach a consensus on any provision that restricts the freedom of navigation and overflight at sea. Therefore, rather than clarifying the existing provisions of the LOSC, a better approach would be to focus on how to encourage States to strictly adhere to the current provisions of the LOSC in good faith.

As there are no existing international law rules governing the interaction between sovereign immune aircraft outside national airspace, establishing a code of

conduct or set of guidelines for unplanned encounters at sea for sovereign immune aircraft is also critical. A number of incidents have occurred between Chinese, Japanese and U.S. sovereign immune aircraft in the East and South China Seas, and between sovereign immune aircraft of the United States and Russia in the Baltic Sea. These incidents have revealed a loophole in the international legal regime regarding the interaction between State aircraft in international airspace.

In recent years, there have been a number of regional and bilateral agreements regarding the interaction between military vessels and aircraft at sea. The Code for Unplanned Encounters at Sea (CUES) was approved in 2014 by the Western Pacific Naval Symposium, and two Memoranda of Understanding (MoUs) have been signed by China and the United States on sea-air interactions. However, similar agreements ensuring safe encounters between non-naval law enforcement vessels and aircraft are yet to be devised. Given that coast guards and other maritime law enforcement agencies are playing critical roles in protecting the sovereignty and sovereign rights of concerned States, especially in the East and South China Seas, the potential for clashes between these forces should not be ignored. As a result, encouraging regional civilian law enforcement agencies to have an agreement in place for the safe behaviour of their vessels and aircraft at sea is a critical consideration.

10.3 Recommended areas for further research

The thesis has exposed a number of areas that require further research for the continued improvement of maritime safety and the freedom of navigation and overflight at sea.

As States in the South China Sea have not been able to agree on what areas are in dispute, any proposal for sharing resources or for the joint development of such

resources in contested areas is unlikely to succeed. Moreover, apart from resources, the South China Sea has strategic and security importance to littoral States; therefore, sharing resources is not the highest priority for these particular States. An avenue for further research could thus be ways of maintaining the current status quo in the region. Indeed, this research could investigate indirect approaches to achieve this goal – approaches which eschew any reference to disputed areas. This could take the form of regional cooperative mechanisms for maintaining the safety of sea lines of communication and protecting the region’s marine environment and natural resources.

Despite the Cold War having ended 25 years ago, an increase in the number of Air Defence Identification Zones (ADIZs) due to sovereignty and security concerns is likely to continue into the future. As there are currently no international law rules governing the establishment of ADIZs, further research could be conducted on international guidelines and geostrategic factors related to ADIZs (and with the objective of maintaining the safety and freedom of overflight at sea).

In the East and South China Seas, Chinese fishing vessels have received specialised training and been equipped with advanced electronics and even some warfare capabilities. As a result, these fishing vessels have been transformed into maritime militia to support China’s maritime claims in times of peace, and to bolster the State’s military forces in times of armed conflict. This tactic not only poses potential threats to the safety and freedom of navigation of vessels of other States in the region, but also raises concerns over how to distinguish between civilian fishing vessels used for peaceful purposes, and fishing vessels which are being used to support military

forces in times of war.¹ Therefore, research focusing on the legality of using “irregular” fishing vessels to enforce maritime sovereignty claims in peacetime, and to support military forces in times of armed conflict at sea, could help fill this loophole in international law.

ASEAN should play a key role in maintaining regional security. However, due to its consensus-based decision-making process, it is hard for ASEAN to stand firm on regional security issues, particularly South China Sea problems. Further research on the limitations of the ASEAN Charter would, therefore, be useful.

Lastly, as unresolved maritime disputes have the potential to lead to maritime conflicts if not carefully managed, resolving disputes by peaceful means and with reference to international law rules and norms should always be a priority. Against this backdrop, the opportunity exists for research which critically assesses rule-based versus power-based approaches in resolving sovereignty and maritime disputes. Such research could help encourage concerned States to settle disputes through peaceful legal processes rather than resorting to armed conflict.

In order to establish a broad spectrum of potential approaches to issues in the South China Sea, the above-mentioned research areas should be fully investigated. It is fervently hoped that the proposals canvassed in this thesis, when combined with the results of the further research, will lead to the maintenance and promotion of maritime safety, stability and security – not only in the South China Sea but in all ocean spaces.

¹ See James Kraska, *How China Exploits A Loophole in International Law in Pursuit of Hegemony in East Asia* (January 2015) Foreign Policy Research Institute <<http://www.fpri.org/article/2015/01/how-china-exploits-a-loophole-in-international-law-in-pursuit-of-hegemony-in-east-asia/>>.

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